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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894

Nos. 785, 786. 160 + 161

ALFRED CLARKE, PLAINTIFF IN ERROR,

vs.

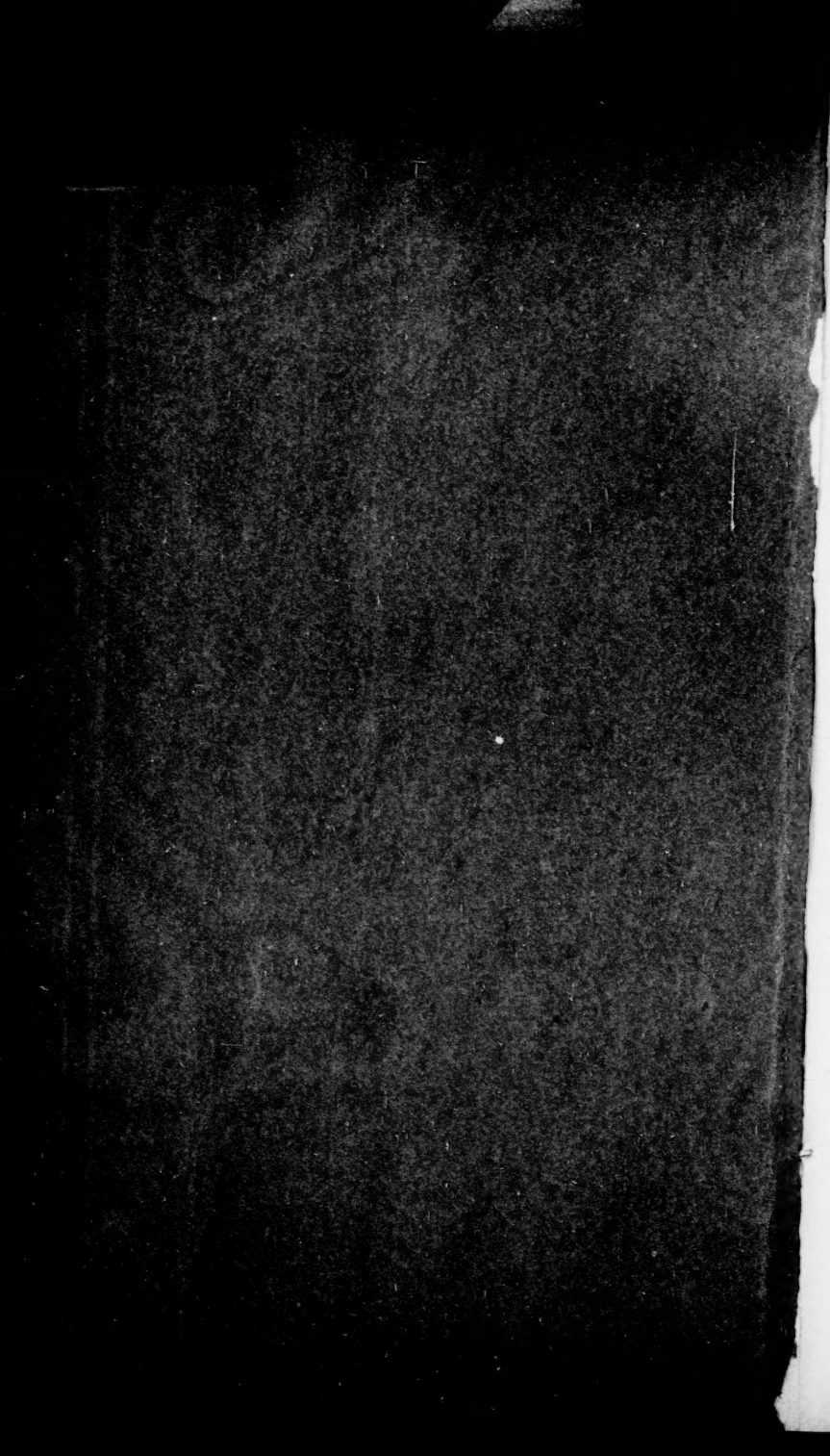
C. MOTT, ET ALS., DEFENDANTS IN ERROR.

POINTS AND AUTHORITIES FOR THE PLAINTIFF.

CLARA S. FOLTZ,

Attorney for Plaintiff.

San Francisco *1894*



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STATEMENT.

Please see Recapitulation of points of error on pages 61 to 63, *infra*.

NOTE.—This brief was printed before the transcripts were printed. The pages referred to in this brief in reference to the transcripts, are the pages of the MS. or original.

The act does not in terms dispense with the use or service of a summons. But the prosecutors took the risk of proceeding without service of summons or other equivalent writ.

This plaintiff says that due process of law requires the service of summons or equivalent writ, running in the name of the People, and sealed.

"This style of all process shall be 'The People of th California.'" Constitution California, § 20, Article 6. 22 202, Re Rohe, 5 Ark., 105.

"The requirement is constitutional and the defect is jurisdictional."

Forbes *vs.* Darling, 94 Mich., 621. (54 N. W. R. 387.)
Choate *vs.* Spencer, 32 Pac. Rep., 551;
Brewster *vs.* Norfleet, 22 S. W. R., 226;
McLendon *vs.* State; " " " 202
Ins. *vs.* Hallock, 6 Wall. U. S., 559;
Lazzerone *vs.* Oshei, 21 N. Y., Supp., 272.

The General Assembly of Virginia, in 1660, resolved that "all "writs shall issue in its name." Bancroft, Vol. II., p. 188.

"The Constitution of California is mandatory."

Welch *vs.* Bramlet, 98 Cal., 219–224.

Until filed the Order did not become a part of the records in e case."

Broeder *vs.* Conklin, 98 Cal., 364.

The Order cannot take effect until filed."

Conley *vs.* Ashworth, 98 Cal., 205.

"A void Order is a nullity."

Sutton *vs.* Symonds, 100 Cal., 576.
Smith *vs.* Los. A., 99 Cal., 628.

The Order shown in transcript 785 page 2, was, to show cause on October 14th, 1891. It was not filed till October 15th; the time for obedience or performance was gone, lost, evaporated.

The transcript No. 785 shows, page 2, that no other process was issued except the order of date of October 2d, filed October 15th, 1891.

The use of writs is as old as any written law.

"Blackstone, Book III., § 275, describes writs, as the foundation "of the jurisdiction of the Court, being the Kings warrant for the "Judges to proceed to the determination of the cause."

When our fathers threw off the dominion of the crown they preserved the science and the practice of the law; and as "the "sovereignty of the State resides in the people," § 30, P. C., so it is necessary that all writs shall issue in their name. But without this reason, how can the plain provision of § 20, of Article VI., of our mandatory Constitution be avoided?

"All writs and process shall issue in their name." § 30, P. C.

Doherty *vs.* Austin, 94 Cal., 608.

Clarke says he has been deprived of liberty and property by the State without due process of the law. The order, the impossible order of October 15, 1891, (see page 2, transcript No. 785) to do

an act yesterday, was never served after it was filed. See page transcript No.

This order was void for want of jurisdiction to make it.

It was void because no real and substantial bond was given.

It was void because it did not recite the fact that a bond was given.

"It was necessary to show by the order itself the existence of "all the conditions under the Statute." Re Johnson, 98 Cal. 552; Re Carroll, 34 Pac. R., 518.

Long *vs.* S. F. Co., 36 Pac., 806;

Thomas *vs.* Am. F. L., 47 Fed., 557.

"Without summons the Court has no jurisdiction. 86 Cal., 399.

"The punishment for contempt is a criminal action." 99 Cal., 360. 40 Pac. 37 NE. 1004.

"The facts must be alleged and found." 34 Pac. 518.

"A jury trial is provided in cases of criminal contempt."

§ 7, Article 1, of State Constitution, § 689, of Pe[illegible]

Hodges *vs.* Easton, 106 U. S. 408. 101.

There is no word in the insolvent act, which dispenses service of summons.

Section 10, provides, "that if respondent make default." We say that the word "default" has a legal meaning. Disobedience to the order of Court (made under Section IX,) might be a contempt of Court but would not be a default.

In this case *there was* no order of Court ever made. Chamber orders are frequently made granting time to plead, etc.; but to enter a default, or gain a judgment, requires more than a chamber order.

In like manner Section IX., insolvent act, requires, not a chamber order, but an order of Court.

There is no difficulty, or inharmony, in taking out, and serving and, returning, a summons in an insolvency proceeding.

Section 585, C. C. P., says "the clerk must enter the default of "defendant,"—"in cases where no answer has been filed within "the time specified by the summons," etc. The time for entering the default under Section 10, must commence from the service of summons. There is no other period from which it can commence.

The word "default," has been interpreted, (viz.):

"Judgment on default (reversed)."

55 Cal., 355.

"The Court could not enter judgment by default;"

60 Cal., 11.

37 Pac 120. 240.

"Motion to set aside the default;"
64 Cal., 265.

"Proof of service a condition precedent to judgment by default."
66 Cal., 43.

"Summons not served the Superior Court had no jurisdiction to "enter judgment against him."
75 Cal., 377.

"If proof of service of summons is not made as required by law, "the Court acquires no jurisdiction of the person of the defendants "and has had no authority to render judgment against them."
36 Cal., 399.

"Appeal from judgment, by default," (reversed.)
88 Cal., 581.

The word "default" in these decisions has the same meaning as in section XII of the insolvent act.

"The laws of the State must be read together."
People *vs.* Applegarth, 64 Cal., 230;
Ex parte Clancy, 90 Cal., 555;
People *vs.* Superior Court, 34 Pac. Rep., 495;
S. I. *vs.* S. F., 35 Pac. Rep., 551; 101 Cal 134.
Long *vs.* S. F., 36 Pac. Rep., 806.

all process shall issue in the name of the people."
Article VI, Section 20.

is constitution is mandatory. (We quote a Tennessee case):
ll writs and other process shall run in the name of the State "of Tennessee. * * *

"Clearly the order here in question, if possessed of any virtue at "all, was a writ or other process, within the meaning of the Con- "stitution.

"It was intended to serve the purpose of a writ, or other process, "and as such it could have been valid (if so otherwise) only when "running in the name of the State of Tennessee.

"It did not so run and for that reason it was void on its face.

"The requirement of the Constitution applies to all process, "civil or criminal, issued by any court or tribunal established by "law, having authority to issue process."
McLendon *vs.* State, April 29th, 1893, (Tenn.) 22 S. W. Rep., 202;
Forbes *vs.* Darling, 94 Mich., 621; 54 N. W., 387;
Dogherty *vs.* Austin, 94 Cal., 608;
Re Rohe, 5 Ark., 105.

Also see,

Choate *vs.* Spencer, 32 Pac. Rep., 661;
Brewster *vs.* Norfleet, 22 S. W. R., 226, (Texas);
Insurance *vs.* Halleck, 6 Wall, U. S., 363.

The order is clearly insufficient under the ruling of the Supreme Court in Re Carroll, 34 Pac. Rep., 518.

The order of October 2nd, 1891, could not take effect until filed.

Connolly *vs.* Ashworth, 98 Cal., 305;
Broder *vs.* Conklin, 98 Cal., 364;
Sutton *vs.* Symonds, 100 Cal., 576.

This order is process or not process.

If process, it is void because not in the name of the People and not sealed, and not served by the Sheriff.

McLendon *vs.* State, 22 S. W. Rep., 202; 94 Cal., 608.
Insurance *vs.* Halleck, 6 Wall U. S., 359.
Forbes *vs.* Darling, 54 N. W., 387; 94 Mich., 621;
Choate *vs.* Spencer, 32 Pac. Rep., 651;

Seal, Sections 152-3, C. C. P.

Brewster *vs.* Norfleet, 22 S. W. R., 226.

"He was not such a person as could execute the process and the Court did not obtain jurisdiction of the person."

Lazzarone *vs.* Oishei, 21 N. Y., Supplement 272, D
ber 21, 1892.
Moffit *vs.* McGrath, 36 Pac., 578.

"Without compliance with this section of the statute there
"want of jurisdiction, and the Court had no authority to act.

Herdman *vs.* Short, 18 Illinois, 60.

"The Court rendering judgments and decrees must have
"diction of the person."

Johnston *vs.* Johnston, 30 Illinois, 223.

"It follows, therefore, that no proper service of the su
"upon the relators was had, and that the judgment compla
"must for that reason, if for no other, be held invalid."

State *vs.* Pierce, 33 Pac. Rep., 829. 37 Pac

"In effect they determine that the phrase "judicial proce
"according to the course of the common law, means that th
"of a person to his life, liberty or property, shall not be d
"except by a judicial determination after due notice in pu
"of a general law."

Scott *vs.* McNeal, 14 S. C. R., 1112. Leading case
Re Bonner, 14 S. C. R., 325-6; (great leading case.
Taylor *vs.* Porter, 4 Hill, 140;

James *vs.* Reynolds, 2 Texas, 251;
Van Zant *vs.* Waddell, 12 Yerg., 270;
Jones *vs.* Perry, 10 Yerg, 50;
State Bank *vs.* Cooper, 2 Yerg., 605;
Budd *vs.* State, 3 Humph., 483;
Holden *vs.* James, II. Mass., 396;
Burger *vs.* Carter, I. McMullen (S. C.), 767;
Dartmouth College *vs.* Woodward (Webster's Arg.), 4 Wheat., 518;
White *vs.* White, 5 Barb. S. C. Rep., 481;
Bank of Columbia *vs.* Okely, 4 Peters Con'd., 443;
Weedcock *vs.* Bennet, I. Cow., 740;
Keney *vs.* Beverly, 3 Hen. Munf., 336;
Hoke *vs.* Henderson, 4 Den., 15;
Brown *vs.* Hunsmuel, 6 Barr., 87;
Ervine's Appeal, 16 Penn. State, 256;
Arrowsmith *vs.* Burlingim, 4 McLean, 498;
Reed *vs.* Wright, 2 C. Greene, 22-24;
Mason *vs.* Messenger & May, 17 Iowa Reports, 267-268.

"But the statute was not complied with, and it would seem to "follow, that there was no jurisdiction."

"No discretion was left to the Court as to what should constitute "notice."

18 Illinois, 551;
Scott *vs.* McNeal, 14 S. C. R., 1212. Leading case.
6 Smedes and Marshall, 259; Id., 351.
3 Cowan, 59; 16 Smith's R., 180; II. Wendell, 648.
7 Ind., 120; 15 Illinois, 394; I. Hill, 130;
7 Barbour, 39; 3 Id., 341; 19 Missouri, 454;
II. How., 437; 2 Yerger, 484;
7 Smedes and Mars., 449; 32 Mississippi, 324;
3 Green, 374; 3 Iowa, 374; 10 Peters R., 161;
II. Foster, 273;
Gibson *vs.* Roll, 30 Illinois, 176.

"If the requisite notice has not been given to, or process has "not been served upon a party, then the Court has no more author- "ity to adjudicate upon his rights, than a stranger or a private "individual.

"And all that the Court does, all its findings are absolutely void, "as well the finding that the notice was given or process served as "the others."

"Take the case where the law requires six weeks notice, and the

"record itself show but three weeks notice given; or where a pro-
"cess has been returned not served, and the Court should find that
"the requisite notice was given; or that the process was duly
"served; it would be absurd to say that such finding was con-
"clusive, when the very record would show that this finding was
"void for want of jurisdiction to find anything whatever in the
"case."

Whitney *vs.* Porter, 25 Illinois, 445;
Reddick *vs.* President State Bank, 27 Illinois, 147;
Gibson *vs.* Roll, 27 Illinois, 88;
Goudy *vs.* Hall, 30 Illinois, 116.

If it is held to be, not process, then we have been depriv
liberty without due process of law.

Chauvin *vs.* Valeton, 8 Montana, 451;
Re Bonner, 14 S. C. R., 325–6. Great leading ca
Scott *vs.* McNeal, 14 S. C. R., 1112. Leading ca

The jurisdiction of insolvency business is conferred
VI, Sec. 5, on the Superior Court, not on the Judge.

It is otherwise as to habeas corpus and other proceedi
the power is conferred on the Courts, and their judges.

(Please read the Constitution, Article VI., Sec. 5.)

It was held "the county Judge is not the county Court."
48 Cal. 70.

The Insolvent Act, 1880, uses the word "Court" all through the Act, and nowhere the word "Judge."

A Court means a Judge, Sheriff, and Clerk.

This is manifest from the statutes.

Sections 4175, 4204, Pol. Code;
Section 93, III County Government Act.

The Sheriff must attend all Courts, the Clerk must attend each session.

Without the attendance of the Sheriff and Clerk the Court is not in session.

"No such authority is given to the Judge, when not holding "Court."

34 Cal., 332; 35 Cal., 691;
30 Cal., 334; 41 Cal., 65;
46 Cal., 32; 46 Cal., 241;
48 Cal., 70;
63 Cal., 404; 49 Cal., 241;
84 Cal., 404.

The order must be filed.

Connelly *vs.* Ashworth, 98 Cal., 205;
Von Schmidt *vs.* Widber, 34 Pac. Rep., 110;
Broder *vs.* Conklin, 98 Cal., 364;
Shain *vs.* C. L. C., 98 Cal., 123;
Sutton *vs.* Symonds, 100 Cal., 576.

It must be issued by the clerk.

Sec. 4204, Pol. Code;
Sec. III, County Government Act.

The Political Code continues in force.

74 Cal., 552; 92 Cal., 247; 83 Cal., 405.

It must go in the name of the people.

Sec. 20, Art. VI, Constitution;
Sec. 30, Pol. Code, and Sec. 17, Sub. 6 of C. C. P., and Sec. 4175 of Pol. Code;
Sec. 92, County Government Act;
McLendon *vs.* State, 22 S. W. Rep., 202, 206;
Choate *vs.* Spencer, 32 Pac. Rep., 651;
Doherty *vs.* Austin, 94 Cal., 608;
Forbes *vs.* Darling, 54 N. W. R., 387; 94 Mich., 621.

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e sealed.

Re Smith, 33 Pac., 958;
Brewster *vs.* Norfleet, 22 S. W. R., 226;
Secs. 152-3, C. C. P.;
Sec. 1503, Penal Code;
Secs. 30, 4175, Pol. Code;
Insurance *vs.* Halleck, 6 Wall. (U. S.) 559.

e by incompetent person is void.

Moffit *vs.* McGrath, 36 Pac. 578;
Lazzarone *vs.* Oishei, 21 N. Y. Supplement, 272;
Moffitt *vs.* McGrath, 36 Pac., 578.

Statute must be strictly pursued.

Brown on Jurisdiction, pages 110, 111;
Shipman *vs.* Forbes, 97 Cal. 574, citing cases.

If proof of legal service be wanting, the Court acquires no jurisdiction.

86 Cal., 399; 57 Cal., 355; 60 Cal., 11; 64 Cal., 265; 66 Cal., 43; 75 Cal., 377; 88 Cal , 582;
4 W. C. R.,294.

"He was not such a person as could execute the process, and the "Court did not obtain jurisdiction of the person."

Lazzarone *vs.* Oishei, 21 N. Y., Supplement, 272, Dec. 21, 1892.

Moffitt *vs.* McGrath, 36 Pac., 578.

"Without compliance with this section of the statute, there was "a want of jurisdiction * * * and the Court had no authority "to act.

Herdman *vs.* Short, 18 Illinois, 60.

"The Court rendering judgments and decrees must have juris-"diction of the person."

Johnston *vs.* Johnston, 30 Illinois, 223.

"It follows, therefore, that no proper service of the summons "upon the relators was had, and that the judgment complained of "must for that reason if for no other be held invalid."

State *vs.* Pierce, 33 Pac. Rep., 829.

We refer to 30 Illinois, 116; Id., 176; 17th Iowa, 268.

Whether a person other than the Sheriff could or could not serve insolvency orders from 1880 to 1883, is unimportant in this case.

If yea, then we say the law was changed by the County Government Act of 1883, (Section 92.)

The County Government Act repealed all laws in conflict therewith.

All process excludes none, and the same language in Article VI, Section 20 of Constitution, and Section 92 of the County Government Act means the same in both instruments.

Shipman *vs.* Forbes, 97 Cal., 574.

If the Insolvent Act ever authorized any person, other than the Sheriff, to serve process, it is repealed by the County Government Act. The same may be said of Section 410, C. C. P.

"Due process of law" has the same meaning in the XIVth Article, the California Constitution, the Political Code, and the County Government Act.

As the orders complained of are void, "they can be attacked in "any proceeding."

Smith *vs.* Los Angeles, 34 Pac. Rep., 243.
99 Cal., 628.

There are other very strange lapses, and resulting deficiency of jurisdiction, to be found in the proceedings of which this petitioner complains;

The Insolvent Act, Section 8, says: "Said petition shall be "accompanied by a bond, etc.

"It was necessary to show by the order itself the jurisdictional "facts."

Re Johnson, 98 Cal., 552;
Re Carroll, 34 Pac. Rep., 318;
Thomas *vs.* Am. F. L., 47 Fed., 557;
Long *vs.* S. F'co, 36 Pac. R., 806;
S. I. & I. *vs* S F'co, 35 Pac., 551.

In this case the bonds given was an attachment bond, never approved by the Judge, duly excepted to by petitioner, exception disregarded.

"When the statutes prescribe the form * * * or mode "* * *, that mode must be strictly pursued."

97 Cal., 574, citing cases.

"A void order is a nulity."

Smith *vs.* Los Angeles, 34 Pac. Rep., 243;
99 Cal., 628.

"As the order was made in the execution of a statutory authority, "it was necessary to show by the order itself the existence of all "the conditions under the statute."

Re Johnson, 98 Cal., 552;
Thomas *vs.* Am. F. L., 47 Fed., 557;
S. I. & I. *vs.* S. F'co, 35 Pac., 551;
Re Carroll, 34 Pac. Rep., 518;
Long *vs.* S. F'co, 36 Pac., 806;

"Every essential fact must be stated."

Long *vs.* S. F., 36 Pac. Rep., 806;
Thomas *vs.* Am. F. L., 47 Fed., 556;
50 Cal., 552.

The order made Oct. 2nd, 1891, out of Court, by the Judge in chambers, and not filed before Oct. 15th, 1891, does not say that any bond was filed.

It is therefore insufficient to show the jurisdictional condition, on which the power to make the order depends.

We claim for this reason (as well as for other reasons) the order was and is null and void.

The order of Sept. 15th, 1893, is open to the same objections. It fails to show the jurisdictional facts.

Re Johnson, 96 Cal., 552;
Re Carroll, 34 Pac. Rep., 518.

"This order was void and is a nullity."

Smith *vs.* Los Angeles, 34 Pac. Rep., 243;
99 Cal., 628.

"If the mode of proceeding be not specifically pointed out, " * * * any suitable mode * * * may be adopted which "is most conformable to the spirit of this Code."

Section 187, C. C. P.; 50 Cal., 542; 53 Cal., 680; 63 Cal., 192; 72 Cal., 320; 65 Cal., 192; 71 Cal., 601.

We say a summons, or writ in the nature of a summons, is indispensable.

It must go in the name of the People.

Article VI., Section 20, Constitution.

Must be sealed.

34 Cal., 608;
Sec. 30, 4175 Pol. Code;
Secs. 152-3, C. C. P.

It must be issued by the Clerk.

Sec. 4204, Pol. Code;
Sec. III., County Government Act.

Must be served by the Sheriff.

Sec. 4176, Pol. Code;
Sec. 95 County Government Act;
Moffitt *vs.* M. Gratt, 36 Pac., 578.

The order must be filed before service; and service by an incompetent person is null and void, and gives the Court no jurisdiction.

The orders in this case fail to conform to the spirit of this Code.

"The judgment is void, and the proceedings to enforce it may "be prevented, and the judgment declared void under a writ of "review."

Santa Monica *vs.* Eckert, 33 Pac. Rep., 881.

The law must be read and interpreted together.

64 Cal., 230.

"A void order is a nullity, and can be attacked in any proceed-"ings."

Smith *vs.* Los Angeles, 34 Pac. Rep., 243;
99 Cal., 628.

"The Legislature shall prescribe their duties," (*i. e.*, duties of sheriffs.)

"This provision is mandatory, * * * and must be made by "general and uniform laws."

Welch *vs.* Bramlet, May 8th, 1893, 33 Pac. Rep., 66;
98 Cal., 219–224.

"As the order was made in the execution of a statutory authority, "it was necessary to show by the order itself the existence of all "the conditions under the statute," etc.

Re Johnson, 98 Cal , 552;
Long *vs.* S. F. Co., 36 Pac , 806;
Thomas *vs.* Am. F. L., 47 Fed., 557.

"Upon the State Courts, equally with the Courts of the Federal "Government rests the duty of protecting the enjoyment of rights "secured under the Constitution of the United States.

49 Fed., 833;
Re Royal, 117 U. S., 241;
Exparte Christenson, 43 Fed., 243;
Cook *vs.* Hart, Nov. 21st, 1892; 146 U.S. 183
13 S. C. R., 40;
Robb *vs.* Connolly, III. U. S., 625.

"All laws of a general nature shall have a uniform operation."

Article 1, Sec. II., Constitution of California.

Sections 9 and 10 of the Insolvent law violate the above rule.

90 Cal., 555.

The duties of county officers must be regulated by general law.

Sec. 5, Article XI., Constitution.

They have been so regulated.

92 Cal., 247; 74 Cal., 557; 83 Cal., 403; 93 Cal., 40;
Sec. 4175, Pol. Code;
Secs. 92, III. of County Government Act, 1883, 1891.

The Insolvent Act, 1880, is not superior to, but is subordinate to the Codes.

Ex-parte Clancy, 90 Cal., 555;
People *vs.* S. F'co, 34 Pac., 495;
S. I. & I. *vs.* S. F., 35 Pac., 551; 101 Cal 137.
Long *vs.* Hebbard, 36 Pac., 806.

The service of process is a matter of general concern, and has been provided for by general law.

See Section 20, Article VI., Constitution;
Sec. 30, Pol. Code;
Secs. 4175, 4204, Pol. Code;
Secs. 92 and 111 of County Government Act.

These laws are of a general nature, and cannot be ignored.

Doherty *vs.* Austin, 94 Cal., 608.

The title of the Insolvent Act does not include the service of process, and any provision foreign to the title must be held invalid.

Sec. 24, Article IV., Constitution; Article 22, Sec. 1.

A special rule of service in cases of insolvency would violate Sec. 2 of Article I., sub. 3, sub. 9, sub. 28, sub. 33 of Sec. 25 of Article IV., of the Constitution.

90 Cal., 557.

If it was conceded (which it is not) that the Insolvent Act operated a novel and peculiar rule for service of process in matters of insolvency, different from and repugnant to the general laws of the State in respect to the service of all process, such a rule would be violative of the general law, (Sec. 4175, Pol. Code) and invalid. See the reasoning of Mr. Justice Harrison in 90 Cal., 557. See page 21, *infra*.

These sections plainly violate sub. 3 of Sec. 25 of Article IV., of the State Constitution.

The practice in Courts of Justice had previously been regulated.

The duties of the sheriff had been regulated by a general law.

Secs. 92, 4175–6, 204 Pol. Code;

Brunner *vs.* S. F., 92 Cal., 247.

The Constitution is mandatory, and the duties had to be prescribed by a general law.

This general law could not be defeated by any special provision of the Insolvent law without violating Sec. 2 of Article I., and subs. 3rd, 9th, 28th and 33d, of Sec. 25 of Article IV., of the Constitution, and Sec. 5, of Article XI. of the same.

But if it was true that Secs. 9 and 10, of the Insolvent Act relating to service of process had a faint and flickering vitality (which we deny) they were repealed by the County Government Act of 1883.

Sec. 184, page 365, Stat. 1883.

And the County Government Act of March 31st, 1891, Sec. 236.

Re Benjamin, 65 Cal., 311;

Fraser *vs.* Alexander, 75 Cal., 154;

Longan *vs.* Solano, 65 Cal., 124;

Mercer *vs.* Regerts. 66 Cal., 26;

Santa Clara *vs.* S. P. R., 66 Csl., 644;

Miller *vs.* Kister, 68 Cal., 142;

Re Guerrero, 69 Cal., 92;

Martin *vs.* Spivalo, 69 Cal., 610;

Re Bickerstaff, 70 Cal., 40;
People *vs.* Russell, 74 Cal., 578.
Brunner *vs.* S. F., 92 Cal., 247;
Dougherty *vs.* Austin, 94 Cal., 606.

She Political Code continues in force. (Jan. 1888.)

People *vs.* Parvin, 74 Cal., 552;
Brunner *vs.* S. F., 92 Cal., 247;
Boyne *vs.* Ryan, 100 Cal., 265;
S. L. O. *vs.* Pettit, 100 Cal., 442.

The definition of process and duties of sheriff prescribed by Sec. 4175, of Pol. Code, were a part of the laws relative to the judicial system of the State when the Constitution of 1879 was adopted.

Under Section 11 of Article XXII., they remain in force till changed by the Legislature.

Wickersham *vs.* Brittain, 93 Cal., 40.

"The Legislature has provided a general and uniform law regu-
"lating the practice of Courts of Justice."

People *vs.* C. P., 83 Cal., 403.

"The law of practice regulates the formal steps; it deals with
"writs, summons, * * * orders, * * * *" etc.

83 Cal., 404.

Section 9 of the Insolvent Act provides "the Court" may make an order. There has been no order made by the Court in this case. Section 4204, of the Political Code, sends this Court order when made to the Clerk's office, and when the Clerk issues the order in legal form, Sec. 4175, Pol. Code sends the process to the sheriff, who makes legal service and return.

In the present case there is no order of Court and no return of service.

This Constitution is mandatory.

Doherty *vs.* Austin, 94 Cal., 608;
Forbes *vs.* Darling, 54 N. W. R., 387; 94 Mich., 621.
writs and process must issue in the name of the People."
Sec. 20, Article VI., Constitution;
Sec. 30, Pol. Code.

And must be "sealed."

Secs. 152-3, C. C. P.;
Sec. 1503, Penal Code.

See Sec. 17, sub. 6, C. C. P., for definition.

McLendon *vs.* State, 22 S. W. R., 202.

"We hold the summons was void and gave the Court no jurisdic-
"tion."

Choate *vs.* Spencer, 32 Pac. Rep., 651.

"If proof of service of summons is not made, as required by law, "the Court acquires no jurisdiction."

Moffitt *vs.* McGrath, 36 Pac., 578.

The doctrine is clearly asserted in 57 Cal , 355; 60 Cal., 11; 64 Cal., 265; 66 Cal., 43; 75 Cal., 377; 86 Cal., 309; 88 Cal. 582; 4 W. C. R., 294.

The duties of sheriffs seem to have been defined in a fragmentary manner, by the Act of April 29th, 1851.

See compiled laws, 1858, page 712.

Duties of County Clerk, Act of April 19th, 1850. (Page 192 of compiled laws, 1853.)

But when the Codes were adopted, these subjects received a full, complete and expansive regulation.

Insurance *vs.* Hallock, 6 Wall, 559;

Lazzarone *vs.* Oishei, 21 N. Y., Supplement 272;

32 Pac. Rep., 651.

"All writs and process must issue in the name of the People, and "must be sealed."

Sec. 152-3, C. C. P.;

Sec. 30, Pol. Code.

Article VI., Sec. 20, Constitution;

McLendon *vs.* State, 22 S. W. R., 202;

Doherty *vs.* Austin, 94 Cal., 608;

Forbes *vs.* Darling, 54 N. W. R., 387; 94 Mich., 621.

The same Code regulates the duties of county officers. (Secs. 4101 to 4384).

Sec. 4175 gives a complete definition of process.

This was given four years after the adoption of the XIVth Article, U. S. Constitution, and was made for the purpose of enforcing its provisions, and in order that all men might know what was and what was not the due process of this State.

Without which no person can be deprived of liberty, and no Court can act.

Having provided, (1) That all process must go in the name of the people. (2) The meaning of process. (3) Issuance by the Clerk. (4) It provides (Sec. 4167) "process must be served and returned by the sheriff."

If no County Government Act was passed, the law would stand as above stated. But what can be said to explain the fact this is that in 1883, 1891, 1893 the Legislature has by a general lawre-enacted the precise words of Sections 4175-6, and 4202 of the Political Code?

In this case there was a chamber order made by the Judge which was not filed before the 15th of October, 1891. Such an order would not be the order required by Sec. 9, of the Insolvent Act. "It would be not such business as the Judge is authorized to transact out of Court."

30 Cal., 584.

o such authority is given to the Judge, when not holding "

34 Cal. 332.

"The statute * * * does not authorize the Judge at cham-"bers to make the order, and requires the application to be made "to the Court."

"The attention of the Court must be called to it."

"The Court must be moved to grant the order."

41 Cal., 65.

"The order * * * was void because made by the Judge and "not by the Court."

46 Cal., 32.

"The Judge in chambers had no power to make the order."

49 Cal., 241.

Such an order could have no effect until filed.

And if not filed till October 15th, 1891, it was the duty of the prosecution to serve the process after said date.

This was not done.

"Practice regulates * * * orders," etc.

83 Cal., 404.

There has been no legal process in our case.

The Court had no jurisdiction; the action should be dismissed.

The Supreme Court construed Sections 4175-8 of the Pol. Code, now, and here, under review.

Brunner *vs.* S. F., 92 Cal., 247.

This recent and authoritative case says: "Sections 4175 to 4193 deal with the duties of sheriffs, and with process, and notice and their services."

The original Constitution of the United States, 1789, contains the words: "This Constitution and the laws of the United States * * "shall be the supreme law of the land, and the judges of every "State shall be bound thereby, anything in the Constitution or "laws of any State to the contrary notwithstanding."

We refer to Sections 763-766 of the Revised Statutes of the United States, and 140 U. S., 291, and observe that in certain cases the party aggrieved may apply to the Federal Courts, and in such

case the jurisdiction of the State Court is suspended, and its proceedings are null and void until after the final decision of the Federal Courts.

"If they (*i. e.*, the State Courts) fail therein * * * the party "aggrieved may bring * * * the case * * * to this Court "for final and conclusive determination."

Robb *vs.* Connolly, 111 U. S., 625. - 146 US 183

The Revised Statutes of United States, Sections 1003-1005, provide the method of access from the State Courts to the Supreme Court of the nation.

And the right of review being given, the means to make that right effectual are also given.

The word "Court," which is used in nearly every section of the Insolvent Act, means the Court of the Constitution and the Codes.

It is different from the Judge of the Court.

The orders prescribed in the Insolvent Act must be made by the Court. The Legislature cannot alter the meaning of the word "Court."

Cameron *vs.* Kentfield, 57 Cal., 554;
Farmer *vs.* Thresher, 62 Cal., 407.

The orders we complain of were not made by the Court, but by the Judge, out of Court, and not filed.

"No such authority is given to the Judge, when not holding "Court."

34 Cal., 332.

"The application must be made to the Court."

"The Judge in chambers had no power to make the order."

49 Cal., 241; 30 Cal., 564; 46 Cal., 32.

These orders were not served after filing, no process on these orders was ever issued by the clerk, as required by Sec. 4204, Pol. Code, and Sec. 111 of County Government Act, or served by the sheriff as required by Sec. 4175, Pol. Code, and Sec. 92, County Government Act.

These orders were and are unsealed and must be held to be null and void, under Insurance *vs.* Hallock, 6 Wall (U. S.,) 559.

"Due notice in pursuance of a general law. (See page 55-7-23

The general law has been passed in Pol. Code, Secs. 30, 4175, 4204, and remains in force.

74 Cal., 552; 92 Cal., 247; 83 Cal., 405; 94 Cal., 247; 83 Cal., 405; 94 Cal., 608.

"This provision is mandatory."

Welch *vs.* Bramlet, 33 Pac. Rep., 66;
98 Cal., 219-224.

The Insolvent Act, 1880, could not repeal or invade the provisions of the general laws of the State regulating the issue and service of all process.

To give it such effect would violate Sec. 11 of Article I., and disregard the ruling in ex-parte Clancy.

90 Cal., 555.

It would violate subs. 3, 9, 28 and 33 of Sec. 25 of Article IV., and Sec. 5 of Article XI, and Sec. 11 of Article XXII. of the State Constitution.

These provisions remain in force until changed by the Legislature So says the Constitution, Article XX, Sec. 11.

Wick *vs.* Brittain, 93 Cal., 40.

Instead of changing, the Legislature has three times re-enacted the same language.

The service of legal process is jurisdictional unless waived.

"The defendant must be served with process in some one of the "forms provided by law."

Brown on Jurisdiction, Sec. 40, page 106.

"The want of jurisdiction was fatal."

McDaniel *vs.* Connell, 19 Illinois, 223.

We made no waiver of service of process and the Court proceeded without issue, or evidence of summons, or any process of law.

The order of Oct. 2d, 1891, was not under seal, was not filed before Oct. 15th, 1891, was not issued by the clerk, not served by the sheriff, was not served after filing, not running in the name of the People.

An involuntary answer is not an appearance or a waiver of summons.

Lazzarone *vs.* Oishei, 21 N. Y., Supplement 267.

"This jurisdiction is a matter without which every step is void."

85 Cal., 54.

"Given without jurisdiction, may be set aside."

Hansen *vs.* Hansen, 20 Pac. Rep., 736.

"Should remove a dead form."

74 Cal., 405.

"Motion well made."

85 Cal., 397.

"Erroneous and void."

67 Cal., 401.

"Is invalid and void."

86 Cal., 396.

34 Pac 120-240.

"The foundation of jurisdiction."
86 Cal., 396.
Blackstone, Book 3, Sec. 275.

"Such they hold to be the true meaning and intent of this "section."
Bartlett *vs.* Cottle, 63 Cal., 366;
Biddle *vs.* Brizzolari, 64 Cal., 354;
Barbieri *vs.* Ramellie, 84 Cal., 154;
Brown *vs.* Willis, 67 Cal., 235;
By Sanderson J. in Felton *vs.* West, April 1st, 1893. (See Law Journal, April 14th, 1893.)

"We hold that the summons—the judicial writ—under the law "and decisions in force * * * was void, because not issued "under seal of the Court, and gave the Court no jurisdiction."
Choate *vs.* Spencer, Montana, 32 Pac. Rep., 651;
6 Wall, 559; 22 S. W., 226.

"The Court's jurisdiction in a proceeding of this character comes "only from the statute under which it claims to act, and its powers "are limited by the statute alone.

It is said in Smith *vs.* Westerfeld, 88 Cal. 378:

"Although it is a Court of general jurisdiction, yet in the exer- "cise of these powers its jurisdiction is limited and special, and "whenever its acts are shown to have been in excess of the power "conferred upon it, or without the limits of this special jurisdic- "tion, such acts are nugatory, and have no binding effect upon "those who have invoked its authority or submitted to its deci- "sion."

"And in the case of the State Investment and Insurance Co *vs.* "Superior Court, 35 Pac. Rep., it is said of the jurisdiction of the "Superior Court, in a case involving the principle here involved, "as its jurisdiction is derived from the statute, it is limite[illegible] the "provisions of the statute, (*Re* Bonner, 14 S. C. R., 325), "to the conditions under which it may be invoked, and t "of the judgment which it may make in the exercise of th "diction."

We quote from Windsor *vs.* McVeigh, 93 U. S., 274:

"Though the Court may possess jurisdiction of the acts, of the "subject-matter, and of the parties, it is still limited in its modes "of procedure, and in the extent and character of its judgment. "It may act judicially in all things, and cannot then transcend the "power conferred by law."

As containing an interesting resume of this principle of jurisdiction, and authorities supporting it, (see Thomas *vs.* American Freehold Land and Mortgage Co., 47 Fed. Rep., 556.)

Long *vs.* Hebbard, and Bank Co., May 15th, 1894, by Sup. Ct. Cal., 36 Pac. Rep., 806.

In ex-parte Lange, 18 Wall, 163, Mr. Justice Miller, delivering the opinion of the Court, after stating that the Circuit Court had exceeded its authority in pronouncing sentence upon Lange, and that its judgment was therefore void, said: "It is no answer to this "to say that the Court had jurisdiction of the person of the pris- "oner and of the offense under the statute. It by no means fol- "lows that that these two facts make valid, however erroneous it "may be, any judgment the Court may render in such case."

In the case of Windsor *vs.* McVeigh, 93 U. S., 274, Mr. Justice Field said: "The doctrine invoked by counsel, that when a Court "has once acquired jurisdiction it has a right to decide every "question which arises in the case, and its judgment, as a general "proposition, but is subject to many qualifications in its applica- "tion. It is only correct when the Court proceeds, after acquiring "jurisdiction of the cause, according to established modes govern- "ing the class to which the case belongs, and does not transcend "in the extent or character of its judgement the law which is "applicable to it."

See also, Ponce *vs.* Underwood, 55 Ga., 601, decision by Judge Warner where it is held: "When a Court transcends the limits "prescribed for it by law, and assumes to act where it has no juris- "diction, its adjudications will be utterly void, either as estoppel "or otherwise.

Herm. Estop. 45,

In Hodges *vs.* Easton, 106 U. S., 408, 1 Sup. Ct. Rep., 307, Mr. Justice Harlan, in rendering the decision of the Court, observed:

"It was the province of the jury to pass upon the issues of fact, "and the right of the defendants to have this done was secured by "the Constitution of the United States. They might have waived "that right, but it could not be taken away by the Court. Upon "the trial, if all the facts essential to a recovery were disputed, or "if they so conclusively established the cause of action as to have "authorized the withdrawal of the case altogether from the jury by "a peremptory instruction to find for the plaintiffs, it would still "have been necessary that the jury make its verdict, albeit in con- "formity with the constitutional right of trial by jury, submit a

"part of the facts to the jury, and itself determine the remainder,
"without a waiver by the defendant of a verdict by the jury."

Thomas *vs.* American Freehold Land & Mortgage Co., 47 Fed., 557 to 559.

In all cases where life or liberty is affected by its proceedings, the Court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case and to render judgment.

It cannot pass beyond those limits, in any essential requirement, in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law, or doubtful construction of its terms. There has been a great deal said and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the Courts in criminal cases.

Re Bonner, 14 S. C. Rep., 325-6, by Mr. Justice Field.

The anti-type of our summons is the writ described by Blackstone in Book 3, page 273, "which is the foundation of the juris
"diction of the Court, being the King's warrant for the Judges to
"proceed to the determination of the cause."

We quote from 90 Cal., 557:

"*Any law for the* (acquisition of jurisdiction over a particular
"case, or individual,) *is necessarily of a general nature, and must*
"*have a uniform operation; it was not competent for the Legislature to*
"*provide a different procedure for* (acquiring jurisdiction by) *the*
"*Superior Court in proceedings for insolvency from that which is pro-*
"*vided for * * * exercising its jurisdiction in any other matter*
"** * * Such construction would exclude cases in insolvency from*
"*the uniform operation of this general law, and thereby destroy its uni-*
"*formity and violate the Constitution.*"

Article I., § XI., 25 Cal., 544; 57 Cal., 100; 68 Cal., 142; 76 Cal., 445; 90 Cal., 557.

(The italics are from *Ex-parte* Clancy.)

"The pleadings are the formal allegations of the parties."

420 Code of Civil Procedure.

"The rules by which the sufficiency of pleadings are determined,
"are those prescribed in this Code."

421 Code of Civil Procedure.

"The complaint must contain the title of the action."

426 Code of Civil Procedure.

"The course of proceedings in both cases (law and equity) is
"now the same."

"It i with-
"out re

Cole *vs.* Reynolds, 18 N. Y., 74-76;
Re Tom Tong, 108 U. S., 556;
Re Cota, 110 U. S., 385.

"A civil action is prosecuted by one party against another."
Sec 30., Code of Civil Procedure.

"Every other judicial remedy is a special proceeding."
Sec. 23, Code of Civil Procedure.

"The party prosecuting may be known as plaintiff, the adverse "party the defendant."
Sec. 1063, Code of Civil Procedure.

"The rules of practice regarding civil actions apply."
Sec. 1109, Code of Civil Procedure.

"Every action must be prosecuted in the name of the real party "in interest."
Sec. 367, Code of Civil Procedure.
People *vs.* Pacheco, 29 Cal., 210.

"An application (for a writ of mandate) must be prosecuted in "the name of the real party in interest, otherwise the writ will be "denied."
People *vs.* Pacheco, 29 Cal., 210.

"The action is improperly entitled."
People *vs.* County Judge, 40 Cal., 480.

"A proceeding to procure mandate is a civil action, and the rules "of civil practice are applicable to it."
People *vs.* San Francisco, 27 Cal., 656

"If there be any conflict between the Code of Civil Procedure "and the insolvent act, the former must prevail."
Ex parte Clancy, 90 Cal., 553;
People *vs.* San Francisco, 34 Pac. Rep., 493;
S. I. & I. *vs.* San Francisco, 35 Pac. Rep., 549-551;
Long *vs.* San Francisco, May 15th, 1894, 36 Pac. Rep., 806.

"There cannot be two conflicting rules of law in force at the "same time on the same object."
People *vs.* C. P. R., 83 Cal., 397;
Re Neagle, 39 Fed., 833;
Affirmed 10 S. C. R., (U. S.), 658;
135 U. S., p. 1.

The style of all process must be: "The People of the State of "California."
Article VI., Sec. 20, Constitution.

"All writs and process must issue in the name of the People."
Political Code, Sec. 30.

The citation issued October 2nd, 1891, is fatally defective because not issued in the name of the People.

Also because the names of the parties plaintiff do not appear in the title. This is essential.

44 Cal., 630;
Kent *vs.* West, 50 Cal., 186;
Ward *vs.* Ward, 59 Cal., 141;
83 Cal., 367.

"Writs and process defined."
Sec. 17, Code of Civil Procedure.

"Course of procedure."
Sec. 187, Code of Civil Procedure.

"Copy of order shall be served on the debtor in the same man-
"ner as summons."
Sec. 10, Insolvent Act.

A summons must have a seal, and by parity of reasoning there must be a seal to the process which brings us into Court to be stripped of our estate.

The cogent reasoning in Thompson *vs.* White, 63 Cal., 507-9, shows that the order must be similar to a summons, viz.: The names of the parties plaintiff and defendant in the title of the action. The name of the People in the process, and the seal of Court on the precept.

"The right of a person to his liberty or property shall not be
"divested except by a judicial determination after due notice in
"pursuance of a general law."

See cases cited on page 7, *ante*, also Chauvin *vs.* Valeton, 8 Mont., 451;
20 Pac. Rep., 626.

This appears to be a clear, plain, invincible legal proposition. Yet in our experience it has been violated in its letter, in its spirit and its substance.

The petitioner was imprisoned for twenty-nine days by a Judge without jurisdiction on a void commitment, denied effectual relief by eleven Judges of the Superior Court, and coerced by a threat of life imprisonment to yield up his schedule.

Meeting of creditors called, and held without notice to him, and in his absence, and an assignee elected, without his consent, and a deed of petitioner's pr[illegible]

due process of law, and in clear and plain violation of the XIV. Article, United States Constitution.

Lazzarone *vs.* Oishei, 21 N. Y., Supp. 272;

Scott *vs.* McNeal, 14 S. C. R., 1112. Leading case.

"These prohibitions extend to all Acts of the State, whether "through its legislative, its executive, or its judicial authorities.

Virginia *vs.* Rives, 100 U. S , 313, 318, 319;

Ex-parte Virginia Id., 339, 346;

Neal *vs.* Delaware, 103 U. S., 370, 397.

"And the first one, as said by Chief Justice Waite in U. S. *vs.* "Cruikshank, 92 U. S., 542, 554, repeating the words of Mr. "Justice Johnson in Bank *vs.* Okely, 4 Wheat, 235, 244, was in- "tended to secure the individual from the arbitrary exercise of the "powers of government, unrestrained by the established principles "of private rights and distributive Justice."

"No judgment of a Court is due process of law, if rendered with- "out jurisdiction in the Court, or without notice to the party."

"He must be brought within its jurisdiction by service of proc- "ess within the State, or his voluntary appearance."

Pennoyer *vs.* Neff, 95 U. S., 714, 734.

"And such a judgment is wholly void if a fact essential to the "jurisdiction of the Court did not exist."

Scott *vs.* McNeal, (May 14th, 1894,) 14 Sup. Ct. Rep,, 1112. Leading case. 150 US 649.

It follows that the writing purporting to be an admission of service by the defendant, without proof of its authenticity did not authorize the Court to assume jurisdiction.

Moffitt *vs.* McGrath et al., 36 Pac. Rep., 578–9.

It would be impossible to serve the order filed on Oct. 15th, in time for the respondent to obey it on the 14th (the day before it was filed.) Therefore the Court must conclude, that it was not served, and in the absence of proof of due service, the Court could not gain jurisdiction of the person of respondent.

Moffitt *vs.* McGrath, 36 Pac. Rep., 578.

Sec. 4175, Pol. Code.

"Process" as used in this article includes all writs, warrants, summons, and orders of Courts of Justice, or judicial officers.

Sec. 4176, Pol. Code.

"The sheriff must * * * serve all process and notices, in "the manner prescribed by law."

This section is quoted in 92 Cal., 247.

Sec. 30, Pol. Code.

148 CR 1114 - 1138

" All writs and processes must issue in their name, (*i. e.* the " People.")

Sec. 4204, Pol. Code.

" The county clerk must * * * issue all process."

The County Government Act, pages 320, 323 of 1883, and pages 319 and 322 of 1891 contains the same words, in Sections 92 and 111 of said Act.

" The summons * * * must contain * * * the names " of the parties to the action, must be signed by the clerk, and " issued under the seal of the Court."

Section 407, C. C. P.

" The complaint must contain the title of the action, * * * " and the names of the parties to the action."

Sec. 426, C. C. P.

Our State Constitution is mandatory and prohibitory (94 Cal., 608,) and this applies with as much force to the style of process, as to any other provision.

The Legislature has provided a general law and uniform law, regulating the practice in Courts of Justice.

83 Cal., 403.

The Political Code continues in force.

74 Cal., 552.

Brunner *vs.* San Francisco, 92 Cal., 247.

If there be any sentence in the Insolvent Act which authorizes the service of any process by any person other than the sheriff, such a sentence would contravene the general law of the State, and would fall under the elaboration of Mr. Justice Harrison in *Re* Clancy, 90 Cal., 557 (p. 21 *supra*). alpha

The County Government Act of 1883, and 1891, repealed all laws in conflict with said Acts.

So that as the law now stands, Section 410 of Code of Civil Procedure is repealed in so far as it seems to allow any person other than the sheriff to serve legal process.

In this case there is no pretense that the orders of Oct. 2nd, 1891, or Sept. 15th, 1893, were served after being filed.

It is held in Conley *vs.* Ashworth, 98 Cal., 205, that the order cannot take effect until filed.

The arbitrary nature of this order of Oct. 2nd, 1891, (see folio 2 of Transcript) invites examination.

" He is enjoined from collecting or receiving any debts; and his " debtors are forbidden to pay any debts."

If Clarke has a family how is he to live, or support his wife and children? He may labor, but he is forbidden to collect his wages.

And this order was made without notice to, or hearing of the respondent, and before a summons has been issued or served.

Under "a government of laws and not of men," (118 U. S., 336), the citizen "should not feel the weight of the Judge's finger," (*Re* Bonner, 14 S. C. R., 325), without notice, and hearing; but the punishment of the lash, would be pleasure compared with the cruelty of this order of Oct. 2nd, 1891.

And this so-called order starts on its errand of ruin and destruction, without a seal, and without any insignia of due process of law.

The proceedings before the Court on Oct. 19th, 1893, are fully set out in the specification of errors, ~~1894.~~

They demonstrate the absence of due process of law, along the whole line of action. The proceeding to punish for contempt is a criminal action.

Contempt of Court is a public offense, and by Section 166 of the Penal Code is expressly declared to constitute a misdemeanor, and the refusal of a witness to be sworn is an offense committed in the presence of the Court.

It is a special proceeding, criminal in character, in which the State is the real plaintiff or prosecutor.

Haight *vs.* Lucia, 36 Wis., 360.

In *Ex-parte* Hollis, 59 Cal., 408, it was said:

"To adjudge a party guilty of contempt of Court, for "which he "is fined and imprisoned, is to adjudge him guilty of a specific "criminal offense.

"The imposition of the fine is a judgment in a criminal case."

See, also, *Ex-parte* Kearny, 7 Wheat, 38;
Ex-parte Crittenden, 62 Cal., 534;
New Orleans *vs.* Steamship Co. 20 Wall, 387;
In *Re* Mullee, 7 Blatchf., 25;
Rapelje on Contempts, Sec. 21.
Boyd *vs.* United States, 116 U. S., 616;
Ex-parte Gould, 99 Cal., 362.

"It is none the less a criminal offense, that the statute author-"izes it to be punished by indictment or information, as well as by "the summary proceeding provided in Section 1209, 1222, Code of "Civil Procedure."

"The procedure is analogous to criminal procedure, and the "judgment is imprisonment."

"The essential elements of a criminal offense."

" It is a specific criminal offense * * * punished by indict-
" ment, or a summary proceeding, as in this case * * *."

" The adjudication is a conviction, and the commitment in con-
" sequence is execution."

26 Pa. State, 19.

" Although the alleged misconduct of the defendants occurred in
" the progress of a civil action, the proceeding to punish them for
" such misconduct is no part of the process in the civil action, but
" is in the nature of a criminal prosecution."

" Its purpose is not to indemnify the plaintiff for any damages
" he may have sustained by reason of such misconduct, but to
" vindicate the dignity and authority of the Court."

" It is a special proceeding, criminal in character, in which the
" State is the real plaintiff."

Re Gould, 99 Cal., 360

" It is the duty of the District Attorney to attend the
" Court and conduct on the behalf of the People, all prosecutions
" for public offenses." Modoc 50.

Section 136, County Government Act, page 329, Statutes, 1883.

" All prosecutions must be conducted in the name and by the
" authority of the People." 12 N.Y. Sup. 143

Sec. 20, Article VI., Constitution of California.

" A criminal action is prosecuted in the name of the People."

Sec. 684, Penal Code.

" A criminal contempt consist in the contumacious and unlawful
" refusal of a witness to answer any material question."

Sec. 166, Penal Code.

The jurisdiction of the Police Court extends to this kind of misdemeanor.

" Said Court shall have jurisdiction of all misdemeanors, pun-
" ished by a fine of not less than $1,000."

Statutes 1863-4, page 30.

" All proceedings * * before a Police Court for a public
" offense, * * must be commenced by a complaint on oath."

Sec. 1426, Penal Code.

" A jury trial may be waived."

Sec. 1435, Penal Code.

" The Superior Court shall have jurisdiction of all cases of mis-
" demeanor not otherwise provided for."

Sec. 5, Article VI., of Constitution of California.

The foregoing extracts from the laws of California, show that the

Superior Court had not, and the Police Court had, jurisdiction to punish for contempt on Oct. 19th, 1893.

Peop. *vs.* Lawrence, 82 Cal., 182;
Greens, 78 Cal., 556.

The contempt of Oct. 19th, 1893, was not contumacious; on the contrary it was respectful, and deferential. See Tr. 766 p. 6 to 12

The laws of the State are to be read together, (64 Cal , 330). Thus reading Section 1209 *et. seq.* of C. C. Procedure in connection with Penal Code, there is no such emergency shown in this case, as calls for the exercise of summary power to imprison until performance is accomplished.

Bach *vs.* Moore, 42 Cal., 412;
Galland *vs.* Galland, 44 Cal., 475;
Peop. *vs.* O'Neil, 47 Cal., 109;
5 Crim. L. Mag., 151–483–647.

Under a government of written laws, there is room for honest doubt, and difference of opinion, as to how far one rule or principal of law, is controlled, or qualified by another. Persons who act in good faith, and under the advice of counsel in attempting to solve such questions, are not to be regarded as unworthy of the equal protection of the law. Wallace fined $10.

Re Hoover, 30 Fed., 51. (See p. 41. post.)

The proper solution of such questions may be of great benefit to the commonwealth.

In place of having punishment first, and judgment and decision afterwards, the Courts should incline to hear and determine first, and defer the punishment until after the question of guilt had been conclusively determined by the proper tribunal authorized to decide the same.

The record shows, page of manuscript, page of Transcript that Mr. Clarke demanded a trial by jury on Oct. 19th, 1893.

The laws of California gave him the right to a jury trial in that case.

Sec. 7, Article I., Constitution of California.

And the United States Constitution secures and protects him against any denial or invasion of that right by the State.

Easton *vs.* Hodges, 10[illegible] U. S., 4[illegible]8.

The proceedings of Oct. 19th, 1893, show that a jury was demanded.

There is nothing to show that a jury was waived.

The complaint of Warren Olney, dated Oct. 18th, 1883, charges Clarke with crime.

It is not endorsed by the District Attorney; does not run in the name of the People.

71 Wis., 444.

46 N.W. 97 49 N.W. 1056 pp. 447 to 49 infra

It is mere hearsay, and it is not due process of law.

The matter seems to have been managed by Attorney Olney without the control of the District Attorney; and thus the proceedings is brought within the strictures of the Supreme Cc consin, as expressed in Beimel *vs.* State, 71 Wis., 444.

The words in the Constitution of California, which Mr. Clarke claims entitle him to a jury answering, and confer the right of silence, are the same words contained in the United States Constitution, and these words have been construed in 106 U. S., 408, to mean exactly what Mr. Clarke claims they mean as used in the Constitution of his State.

" The judgment is execution."

99 Cal., 360.

The proceedings are not brought in the name of the People.

Not brought by authority of the People, and the execution runs not in the name of the People; and this defect is fatal.

22 S. W., 202;
5 Ark., 104;
54 N. W., 387;
Sec 30, Pol. Code;
Sec. 20, of Article VI., of Constitution of California.

For the many errors in this record:

The absence of jurisdiction. pp. 5 to 7, supra.
The absence of summons. S. on p. 15, supra.
The absence of due process of law. T. on p. 15, supra.
The want of the name of the People. U. on p. 14 supra.
The absence of a seal. U. on p. 14, supra.
The lack of valid service. F. on p. 9, supra.
The denial of trial by jury.
The imprisonment continued in violation of Sec. 766, R. S. U. S.
The unlawful means used to extort the schedule.

21 N. Y. Sup., 272.

The headstrong proceeding of the State Court, when confronted with Section 766 Revised Statutes of United States.

The appointment of Sheppard as assignee without hearing or notice to the respondent, and the commitment of Oct. 19th, 1893.

For the absence of a valid commitment, and for all the reasons given in the specification of errors, the plaintiff in error asks that the judgment of May 16th, 1892, and the commitment of Oct. 19th, 1893, may be set aside.

The order of Sept. 15th, 1893, page 1, Transcript 786, calls for close examination, because it is conspicuous for the absence of due process of law.

(*a.*) It does not run in the name of the People. See E. on pp. 1 and 4 and 8, supra.

(*b.*) It is deficient of a seal. See D. on page 8, supra.

(*c.*) It had no effect until filed. See B. on page 8, supra.

(*d.*) It was filed twenty-one days after the time for performance had expired.

(*e.*) It was not served after filing.

(*f.*) It was not served by the sheriff. I. on p. 11, F. on p. 24, supra.

(*g.*) It was not made in Court, but in chambers. V. on p. 7, W. on p 16.

(*h.*) It was made on *ex-parte* application, and without notice to, or hearing of the respondent.

8 Mont., 451.

(*i.*) It was made without jurisdiction of the cause, or of the person.

(*j.*) Notice of motion should have been given, and in that manner the respondent could have shown the absence of jurisdiction.

(*k.*) The order being void, there was no duty of obedience. H. p. 10.

(*l.*) A void order may be attacked in any proceeding. G. p. 9.

(*m.*) The order is misentitled; it should have been Mott *vs.* Clarke. Y. on p. 29.

(*n.*) It was not served by any competent person. See F. on p. 9, supra.

(*o.*) No process in the order was ever issued by the clerk, as required by Section 4204 of Political Code, and Section 111 of County Government Act, 1883, page 323.

(*p.*) This order was arbitrary and capricious, and not process of law.

(*q.*) This order was used as a basis for the contempt proceedings of Oct. 19th, 1893, in which a jury trial was denied.

(*r.*) The right to the jury being secured by Section 7, of Article I., of Constitution of California, the enjoyment of that right became secured by the XIVth Article of U. S. Constitution.

Easton *vs.* Hodges, 106 U. S., 408.

(*s.*) This denial of personal liberty, and private right, finds its culmination in open disregard of an Act of Congress.

(*t.*) Respondent having invoked the decision of the federal juris-

diction was protected by Section 766 of Revised Statutes of United States, and the subsequent proceedings in the Superior Court were and are null and void.

The judiciary of the Union, gives a construction to the laws, which is obligatory in the State tribunals.

39 Fed., 833;
135 U. S., 1.

" We should have a government of laws, and not of men."
118 U. S., 356.

" This is the opinion of the tribunal of last resort."
80 Cal., 280.

The orders in this case from Oct. 2nd, 1891, to Jan. 5 breathe an air of severity, vindictiveness, and harshn stands in strange contrast to the serenity and benignity v vade the recent decisions of the U. S. Supreme Court.

Unheard and uncondemned the respondent is ordered i imprisoned for life, and all his property taken from hi hearing or notice and without due process of law.

The XIVth Article gives us protection, "from the un " Acts of Courts and Judges."

Re Bonner, 14 S. C. Rep., 326. Leading case.

The orders we complain of, prevent the lawful use of his property. It takes it away from him without compensation or due process of law, and denies the respondent the equal protection of the laws.

" It is therefore in direct violation of Articles 5 and 14, of the " Amendments of the Constitution of the United States, and of Sec- " tion 13, of Article 1, of the State Constitution, and is therefore void.

" It takes his property away from him, and leaves him no remedy " whatever by which he can regain it or obtain redress.

" It is therefore in conflict with Section 9, of Article 1, of the " State Constitution, which entitles him to a certain remedy in the " laws for all injuries or wrongs which he may receive in his person, " property or character.

" Any restriction or interruption of the common and necessary use " of property that destroys its value, or strips it of its attributes, or to " say that the owner shall not use his property as he pleases, takes it " in violation of the Constitution.

Pumpelly *vs.* Green Bay Co., 13 Wall., 166;
Wynehamer *vs.* People, 13 N. Y., 378;
People *vs.* Otis, 90 N. Y., 48;
Hutton *vs.* City of Camden, 39 N. J. Law, 122.

From 5 Saw. 552

In the contempt proceeding of Oct. 19th, 1893, the respondent demanded a jury trial.

Sec. 689 Penal Code.

"This right was secured to him by the United States Constitution."

Hodges *vs.* Easton, 106 U. S., 408;
100 U. S., 304-312.

By the denial of this right, the Court speeded to imprison the respondent.

Va. *vs.* Rives, 100 U. S., 319.

By means of this unlawful imprisonment, respondent was forced to surrender his schedule, which he did against his will and under protest.

And this schedule thus unlawfully obtained is used as the basis for calling a creditors' meeting and electing an assignee and depriving respondent of his property.

Equity requires the restoration of the rights thus unlawfully trampled under foot.

Respondent calls the attention to the open disregard of Section 766, of Revised Statutes of United States.

Should not proceed.

100 U. S., 317.

After the respondent had invoked the Federal jurisdiction, the plain Act of Congress made all subsequent proceedings to be null and void. 153 US 686.

Yet the Court did proceed, and the imprisonment of Jan'y. 30th, 1894, is one of the results of this proceeding. 37 Pac 230

The decision is in harmony with Lees *vs.* U. S., 14 S. C. R., 163, and *Re* Wilson, 13 S. C. R., 767, and James *vs.* U. S., 49, Alb. Law Journal, 401. 149 US. 61-70. 150 US 476

The decision was published July 2nd, in the San Francisco Legal News, on July 14th, in California Decisions, vol. 8, page 29, and on July 27th in the San Francisco Law Journal. It will be in the first part of 37 Pacific Reporter.

1st. The Court erred in granting the order of October 2nd, 1891, without having gained jurisdiction of the person of the respondent, by the issue of and service of a summons or other judicial writ, which should run in the name of the People.

37 Pac., 120. (R. on p. 15.)

NOTE—The California Supreme Court discharged Mr. Clarke on June 30, from the commitment of January 30th, 1894. 37 Pac 230.

2nd. The summons or process must be issued by the clerk. N. on p. 11.

3rd. The summons must be sealed. M. on p. 11, supra.

4th. The summons must be served by the sheriff. K. on p. 8.

5th. Service by an incompetent person is void. J. on p. 6.

6th. If proof of legal service be wanting, the Court acquires no jurisdiction. P. on p. 9.

7th. Due process of law requires notice and hearing at every stage of the proceeding.

Chauvin *vs.* Valeton, 8 Mont. 454;

Re Bonner, 14 S. C. R., 325. Leading case. 151 US 242

8th. The Court had no power to make a personal order to the respondent until the Court had gained jurisdiction of his person by the service of some legal process. The order of Oct. 2nd, 1891, could have no effect until filed. L. on p. 8.

98 Cal., 123–205–364;

99 Cal., 511.

The order was filed Oct. 15th, 1891.

9th. It should have been served after filing; but it was not. O. on p. 11.

10th. The order should have borne a seal; whereas it did not. D. on p. 8.

11th. The order should have been in the name of the People; but it was not. E. on p. 8.

12th. The order should have been served by the sheriff; but it was not. K. on p. 8.

13th. Process on the order should have been issued by the clerk; but none was issued. N. on p. 11.

14th. The order should have been made in the Court, in open session; but it was not. The County Judge is not the County Court.

Spencer *vs.* Vallejo, 48 Cal., 70.

15th. The order should have been made after notice and hearing; after the Court had gained jurisdiction by due process of law. This was not done.

16th. The bond should have been approved; this was not done.

17th. The order of Oct. 2nd, 1891, should recite the fact that a bond was filed, and approved; it does not so recite. Order must state grounds.

98 Cal., 552. Q. on p. 10.

18th. The exception to the sureties should have produced a justification, or the action should abate.

19th. The leave to amend was given without notice or hearing, and was not due process of law.

Chauvin *vs.* Valeton, 8 Montana, 454.

20th. No bond was given in support of the amended petition; this was error.

21st. The amended petition was not served by any competent person.

" It must be clearly shown that they have appeared.

" In the absence of a clear showing that they were properly in " Court. we cannot now direct a personal judgment against them.

" It does not appear that any service was made."

Howell *vs.* Campbell *et al.*, 37 Pac. Rep., 120. (Kansas).

22nd. The Court erred in denying the objection made by the respondent on November 7th, 1891, to the jurisdiction of the Court.

23rd. The Court erred in its judgment of May 16th, 1892, because it had no jurisdiction of the person or estate of the respondent.

24th to 47th. The Court erred in granting the order of Sept. 15th, 1893, for each reason stated in each one of the foregoing twenty-three (23) assignments of error.

And when through the leniency of Sheriff McDade, the respondent was allowed to visit the Federal Court, on Oct. 20th, 1893, to apply for the priceless writ of liberty, his prosecutors, wickedly devised a plan for his public and shameful humiliation, which they executed on Oct. 21st, 1893, as follows:

On Oct. 21st, 1893, three deputy sheriffs, named A. B. Mcguire, T. J. Clancy and John Burns, without having any warrant or authority, and yet pretending to enforce the judgment in this action, seized respondent in the Court house, at 3 P. M., in the presence of numerous spectators, one of whom was a Judge, and hand-cuffed respondent, and pushed and pulled him into the streets, and into a vehicle, provided by them, and in said vehicle conveyed the respondent, to wit: Two miles through crowded streets—respondent being in irons—and in the presence of many thousand people, and to the common jail, on Broadway in San Francisco.

Respondent had invoked the protection of the National Government, and in the eye of the law was under its protection, and yet this battery and manacleing, and false imprisonment, was done in broad daylight, and most publicly in San Francisco, in direct and open violation of the Constitution and laws of the United States, and done by officers of the law, who had sworn to support the United States Constitution.

Omicron. The captors were bound to show their process in demand. (Pol Code, 4,188.) Respondent demanded inspection of the process; none was shown, because none they had. This was not a private wrong done by a private person, but an assault by the sheriff of San Francisco, on the Constitution and laws of the United States.

5 Fed , 899.

Pi. On Sunday, Oct. 22nd, 1893, in the jail, respondent showed sheriff John J. McDade the Act of Congress (Section 766, Revised Statutes of United States) which forbade said imprisor
said sheriff refused to relieve or liberate the respondent.

Rho. Thus was respondent imprisoned, and though he made four applications to the State Supreme Court, and, to wit: eight applications to the Superior Court of San Francisco, yet he was denied relief, and his captivity prolonged until fatigue and exhaustion compelled his surrender on Nov. 9th, 1893.

Sigma. Nor would he have surrendered then, if the Federal power could be made instantly available for his relief. In order to prevent relief by the United States Supreme Court, his application for writs of error were denied by the presiding Judge, and on a threat of life imprisonment, his schedule was extorted from him. This extortion was a violation of his liberty without due process of law.

Tau. Having thus unlawfully (21 N. Y., Sup. 272) obtained his schedule, the Court without hearing of, or notice to the respondent, on Nov. 21st, 1893, called a meeting of creditors for Dec. 22nd, 1893.

Upsilon. On January 10th, 1894, without notice to, or hearing of respondent, the Court appointed Eli T. Sheppard assignee.

Phi. On Jan. 12th, 1894, without hearing of, or notice to respondent, the Court made a deed of all the property of respondent to Eli T. Sheppard, assignee. On Jan. 23rd, 1884, without hearing of, or notice to the respondent, the Court made an order requiring respondent to appear and testify. (See page 230

Psi. On Jan. 30th, 1894, the Court being without j
made an order committing Alfred Clarke to jail. Discharged, June 30th, 1894, by Supreme Court of California, 37 Pac., p.

Omega. In all of the above proceedings, from *Omicron* to *Omega*, the Court erred in proceeding without due process of law, and denied to the r

" Every acti eal party
" in interest."

Sectio

This action was not so prosecuted.

The original petition was entitled—

"In the matter of Alfred Clarke in involuntary insolvency;" all of the subsequent proceedings were conducted under the same defective and improper title.

(Y.) The proceedings were not conducted in the name of the real party in interest.

Therefore, due process of law was wanting, was not observed.

The insolvent law is a penal statute, and all prosecutions under it must run in the name of the People.

Triplet *vs.* Munter, 50 Cal., 644;

Fraser *vs.* Freelon, 53 Cal., 644.

Under the above erroneous and false title it has gone through all its stages, and all the orders of which we complain are thus entitled.

The respondent has entitled his papers, to wit:

"Mott et. als. *vs.* Clarke," which is the proper title of the action; the Court never gained jurisdiction of the cause, or of the respondent, and all the proceedings have been without due process of law.

Respondent has endeavored in good faith to correct these errors in the Courts of this State and without avail.

To this end he applied four different times to the State Supreme Court to wit: Oct. 20th to Oct. 24th, 1893, for writs of habeas corpus, all of which were denied, although about the same time, said Court, granted writs to other applicants, viz.:

Re Gould, 99 Cal., 360; 15584

Re Carroll, 34 Pac. Rep., 518. 15546.

Respondent also applied for a writ of prohibition, to wit: Nov. 14th, 1893; also he applied for a writ of review, Dec. 14th, 1893, but the State Supreme Court denied both writs. Otherwise (in *re* Shortridge, 99 Cal., 527,) who was relieved on writ of review.

Plaintiff in error has applied to twelve Judges of the Superior Court of San Francisco for review, all without avail; and respondent says that he is without remedy unless it can be had in the United States Supreme Court.

And he has been denied by the State the equal protection of the law in violation of Article XIVth, of the United States Constitution.

Respondent specially relies on his application to the Federal Court, set forth and described on page , of Transcript No. , and claims that all proceedings against him subsequent to Oct. 20th, 1891, were and are null and void, under Section 766, Revised Statutes of United States.

The protection of the law was granted and denied as follows:

HABEAS CORPUS.

Granted.	*Denied.*
Re Gould, 99 Cal., 360; *Re* Carroll, 34 Pac. Rep., 518.	Clarke's 3 and 8 petitions by Supreme and Superior Courts, 1893.

PROHIBITION.

Re Green, 78 Cal., 556; Brunner, 92 Cal., 247; S. I. *vs.* Hebbart, 35 Pac. Rep., 551.	Petition 15,546, denied Nov. 23rd, 1893, by Supreme Court. p 56 infra

REVIEW.

Re Shortridge, 99 Cal., 527;	Petition 15,484, denied Dec. 23rd, 1893.

See *Rho* on p. , *ante.*

The above columns clearly show the discrimination against Clarke in the denial to him of the ordinary writs, which were freely granted to others.

Mr. Clarke paid the usual fee of $10 on filing his petitions for prohibition and review, above noted. The rights of a suitor to "the equal protection of the law" are not diminished or increased by the amount of fees paid.

Absence (lack) of jurisdiction, is known to the highest judicial power as a ground for relief.

Scott *vs.* McNeal, 14 S. C. R., 1112. Leading case.

In all the cases on the left column above, it was so held.

The denial of relief and remedy to Clarke in a like case, *i. e.*, a case involving the same questions—a case on all fours, a case determinable upon similar principles—is a denial of the equal protection of the law.

Dent *vs.* W. Va., 129 U. S., 124;
Chauvin *vs.* Valeton, 8 Mont., 454;
Yick Wo *vs.* Hopkins, 118 U. S., 356;
Ah Kow *vs.* Nunan, 5 Saw., 552–562;
Re Parrott, 6 Saw., 349;
Ex-parte Virginia, 100 U. S., 339;
Barbier *vs.* Soon Hing, 113 U. S., 27–703.

"Arbitrary power" condemned.

Muscoe *vs.* Virginia, 10 S. E. R., 536. 86 Va 443

"Unlawful acts of Courts and Judges."

Re Bonner, 14 S. C. R., 325. Leading case. /

"The King * cannot sit in judgment in any Court; * * the

laws must be administered according to the power committed to, * * his Courts of Justice."

Noble *vs.* Ind., 21 N. E. R., 249; 10 Ind 350
Virginia *vs.* Rives, 100 U. S., 313;
Ex-parte Virginia, 100 U. S, 339;
Neal *vs.* Delaware, 103 U. S., 370.

In Georgia, one Hoover was committed to the custody of Sheriff Ronan.

"The sheriff, with much kindness and liberality, did not confine "his prisoner, but detained him constructively."

"A white man has the right to the protection of the U. S. "* * * He may not be deprived; * * * of equal access "to the Courts; or * * equal protection of the laws."

Re Hoover, 30 Fed., 54.

The writer of this brief owes no apology to any person for his adherence and tenacity to liberty.

He worships at her shrine, and blushes not to be called or known as her disciple and devotee. Liberty ought to be dear to every heart, and sung by every tongue.

"Eternal vigilance is the price of liberty; you must pay the "price if you wish to secure the blessing."

Jackson, 1837.

"Upon this country, more than any other, has, in the providence "of God, been cast the special guardianship of written Constitu- "tions. If it fail here, all hope in regard to it will be extin- "guished."

"We are responsible to our country and to the glorious cause of "self-government for preservation of so great a good."

Jackson, Dec. 8, 1829.

"Providence has chosen you as the guardians of freedom, to "preserve it, for the benefit of the human race."

Jackson.

"While dwelling with pleasing satisfaction upon the superior "excellence of our political institutions let us not be unmindful "that liberty is power; that the nation blessed with the largest "portion of liberty must, in proportion to its numbers, be the "most powerful nation upon earth; and that the tenure of power "by man is in the moral purposes of his Creator, upon condition "that it shall be exercised to ends of beneficence, to improve the "condition of himself and his fellowmen."

President Adams, Dec. 6, 1825.

"Taught to feel that the end of their institutions is the happiness "of the people and that the exercise of power among men can be "justified only by the blessings it confers upon those over whom "it is extended."

Adams, 1825.

"Discarding every remnant of rancor against each other, em- "bracing as countrymen and friends; yielding confidence to "talents and virtue alone."

Adams, March 4, 1825.

"Dissensions threaten the dissolution of the Union, and, with it, "the overthrow of all the enjoyments of our present lot, and all "our earthly hopes for the future."

Adams, March 4, 1825.

"The heart of every citizen must expand with joy when he "reflects how near our Government has approached perfection."

"A Government which protects every citizen in the full enjoy- "ment of his rights."

Munroe, March 17, 1817.

"Secure the blessings of liberty."

Adams.

"If we should ever lose sight of the danger to our liberties."

Adams.

"We must support our rights or lose our character, and with it "perhaps our liberties."

Jefferson.

"A people so prosperous and happy."

Jefferson.

"To maintain, and hand them down to our latest posterity."

Munroe, 1817.

"As long as it secures to us the right of person [illegible] or th[illegible]

Jackson, 1829. Haymond.

"What a proud spectacle ! ! On whom has oppression fallen?

"Who has been deprived of any right of person or property?

"Who restrained from offering his vows?

"All these blessings have been enjoyed in their fullest extent."

Munroe, March 5, 1817.

"To foster a spirit of independence too just to invade the rights "of others, too proud to surrender our own."

Madison, March 4, 1809.

"Freedom of person under the protection of the habeas corpus."

Jefferson, March 4, 1801.

"During the throes and convulsions of the ancient world, during "the agonizing spasms of infuriated man, seeking through blood "and slaughter his long lost liberty, it was not wonderful that the "agitation of the billows should reach even this distant and peace-"ful shore. * * Every difference of opinion is not a difference "of principle. We have called by different names brethren of the "same principle. * *"

"I believe this the strongest Government on earth."
Jefferson, March 4, 1801.

"Liberty will find in such a Government her surest guardian."
Washington, Sept. 17, 1796.

"To preserve them, as necessary as to institute them."
Washington.

"The judicial power of the United States shall extend."
Article III, Sec. 2, U. S. Constitution, 1787.

"State Courts are bound to exercise this power."
Robb *vs.* Connolly, 111 U. S., 625.

"Secure the blessings of liberty to ourselves and our posterity."
Pream. Constitution, 1787.

"Life, liberty, and the pursuit of happiness; to secure these "rights governments are instituted among men."
Dec. Ind., July 4, 1776.

If these exalted sentiments form the foundation stones on which rests our Government, what should be its fruition in the 118th year of its history?

If these be the upholstery of its footstool, what must be the regalia of its throne?

Under such a government, so firmly established, so benignant in its birth and growth, we should not look for exhibitions of personal and arbitrary power. Yet here it is. In this case. And by "ese Judges in San Francisco, the XIVth Article is violated.

"pr See commentary on the XIVth Article on p. 5 of brief, in Clarke *vs.* McDade, now before this Court. Tr. No. .

For the attainment, exaltation, and preservation, of liberty, the noblest men which have blest this earth have spent their efforts and freely yielded their lives, on the scaffold, on the block, and at the stake.

Gov. Berkeley hung Wm. Drummond, in 30 minutes notice, in Virginia, in 1676.

John Hancock, our immortal Washington, and scores of patriot heroes in 1776 accepted the guilt of treason to the British Crown with its consequence, the gallows, and the vengeance of the Crown

of England, all for love of liberty. The seeds of liberty they planted in the eighteenth century sprouted and bloomed in the nineteenth, and gave to humanity a new gospel of freedom in the ever-glorious XIVth Article, proclaimed July 28th, 1868, by our immortal Grant. Who can read the sublime elaboration given by Mr. Justice Stanley Mathews, in 118 U. S., 356, without feeling the glow of freedom's warmth in all his veins? May 1886.

Who is there so base and earth-bound as not to feel a generous pride in our paternal Government, which threw its flag around Martin Kosta, who was only half a citizen, and which now "extends "protection to all persons within its jurisdiction, so that any blow "aimed at any of them, however humble, come from what quarter it "may, is caught upon the broad shield of our blessed Constitution "and our equal laws?"

Ah Kow *vs.* Nunan, 5 Saw., 552–562. July

In the evolution of Liberty, it seems that Georgia is San Francisco.

A Georgia Case.

Mr. Hoover was committed to Sheriff Ronan and allowed by that officer to go on parole.
Re Hoover, 30 Fed., 51–53.

San Francisco Civilization.

Mr. Clarke was jailed on Oct. 19th, 1893, imprisoned 16 days and paraded in irons through the streets, all in violation of the State and Federal Constitutions.

"You may remain in jail till the "end of your days."

By Judge Murphy of Del Norte.

The writer has seen an (35 Pac. 551) essay made by a jurist; (it cannot be called a decision, because the question of jurisdiction was not raised; it was conceded on both sides). The jurist reasons:

1. "That the Court acquires jurisdiction of the property or "estate of the insolvent by the filing of the petition.

2. "And gets complete jurisdiction of the person of the debtor "by the service of the order to show cause." P. 19 ante

The writer questions the correctness of the above assumptions.

We say the summons should be applied for, and issued and delivered to the sheriff for service.

150 U. S., 649;
14 S. C. R., 1112.

It would be safe practice to give notice of motion for the application for the order to show cause.

Chauvin *vs.* Valeton, 8 Mont., 451.

The order to show cause should be served by a competent person; and if served by one incompetent, how can it be said that the Court acquires jurisdiction over the debtor? See J, on p. 8.

After the Court has acquired jurisdiction of the person and estate, it should continue to act within the limits of its jurisdiction, with reasonable regard for such hearing and notice as is appropriate to the movement intended to be made.

If a meeting of creditors is desired, the debtor should have notice of the time and place.

If creditors are called to elect an assignee, reasonable notice should be given to the debtor to attend the election, otherwise how can it be said to be due process of law? (8 Mont., 451; Scott *vs.* McNeal, 14 S. C. R., 1112; 150 U. S., 649.)

If the California insolvency law was designed to excuse service of "summons, why was not the intention made more plain? Why was not the time for taking the default more clearly defined? Why was not some process provided?

To procure a witness in a criminal action requires a subpœna in the name of the People (Sec. 1327, Penal Code). It does not seem reasonable that under a code of laws which contains forms for subpœnas, warrants and commitments, all in the name of the People, the matter of insolvency should be left to chance or hap-hazard. (See p. 3, *ante.*)

To excuse or exclude a summons in a case of insolvency would militate against a general law which is continued in force by Sec. 11 of Art. 22 of Constitution of 1879.

A special rule for insolvency would be unconstitutional.

Re Clancy, 90 Cal., 553. (See *Alpha*, p. 21 *ante.*)

A construction which will render a law unconstitutional ought to be avoided upon the plainest principles of interpretation. Using this guide, we are led to consider that the insolvent law does not dispense with or excuse the service of a summons, or other judicial writ, in the name of the People.

DUE PROCESS. 101 Cal 20-26.

In any view of our case there must be due process of law, or else the XIVth Article is violated.

Whether the defection lies in the text of the statute, or its unskillful application, is less important than the fact that plaintiff in error has been deprived of his liberty and property without due process of law. (See *Re* Swan next following.)

"Any other view would be inconsistent with settled principles "of the common law and with familiar constitutional provisions "for the security of person and property and immunity from unrea- "sonable searches." * * * *

"Indeed, the statute upon any reasonable construction did not "contemplate action without process."

In *Re* Swan, 150 U. S. Rep., 649-650. p. 24 ante

True, the above case was under the liquor law of South Carolina, but it contains the gem of truth which we are pursuing.

The case quoted on p. 24, *Iota*, ante, contains the same gem.

In all cases there must be due process of law. (See *Alpha* on page 21, *supra.*)

Sir Wm. Berkley said to patriot Drummond: "I am more glad "to see you than any man in "Virginia; you shall be hanged in "half an hour," and thus Drummond, Hansford and twenty more gave their lives for liberty. King Charles' opinion of Berkley: "The old fool has taken "away more lives in that naked "land than I for the murder of "my father." A. D. 1676.

"But the fundamental right "to liberty secured by monu- "ments showing the victorious "progress of the race in secur- "ing to men the blessing of "civilization."

118 U. S., 356, etc.

Progress note of Judge James E. Murphy, "You may remain "in jail to the end of your "days." A. D. 1893.

Whether Judge J. E. Murphy has advanced much farther than Gov. Berkley, remains for the reader to judge. But we can't suppress the commentary, that in California where the Codes were adopted, early in 1871, and many months before England passed her Court of judicature Act, (Aug. 5, 1871,) and in the very year when David Dudley Field (the author, and father of Code Reform) died. It seems strange. It sounds harsh: to receive such language from a California bench of Justice, in this same city, which gave us Ah Kow vs. Nunan, quoted on p. 41 of this brief. It may be that in the mystery of a Divine Providence which assists the human race in the "victorious march" described by Judge Mathews, it finds a use for such decisions, in affording to the higher Courts, the opportunity for a severe and pointed reprehension.

Berkley wanted no schools or printing press, as they produced treason and traitors. Murphy don't want jurors, as they might dissent from his views. Having convicted us by his own unaided intellect, of a crime we did not commit, his generosity flows forth in a prayer for our life imprisonment. When Jeffries made his campaign, which resulted in a slaughter of 160 lives, he seasoned

his sentences with a pious ejaculation for the souls of his victims. Judge Murphy omits the prayer as he sends an unoffending family to starvation.

Unquestionably a habeas corpus is a civil action.

Tom Tong, 108 U. S., 556;
Cota, 110 U. S., 385.

Therefore the rules relating to civil actions apply to it.

There must be findings of fact and conclusions of law.

Clarke was remanded without findings. Tr. 783 p. 4

Until the findings are signed and filed there is no judgment.

Sutton *vs.* Symonds, 100 Cal., 576.

True, there are some thirty-two sections (1473 to 1505) in Penal Code, but not being covered by the title of that Code they are unconstitutional under § 24 of Art. IV of California Constitution; therefore the Code of Civil Procedure regulating all civil actions, and the common law rules govern our State practice in regard to habeas corpus.

LET US REASON TOGETHER!

Section 10 of the Insolvent Act requires that the order to show cause be served ten days before the return day. We have above shown, see ante *Alpha*, p. 2, and K on p. 8, that the order has no effect until filed. Our record shows: Trans. p. 785 2 that the order was not filed until October 15th. One day after it was dead. There cannot be invented any presumption that will cure this defect. Legal service becomes negatived on this exigency, and the absence of jurisdiction is demonstrated because due process of law is excluded.

1. The Court had not acquired jurisdiction of his person (pp. 1 to 26 ante.)
2. The order should be made in Court and not in chambers (V. p. 7, ante; p. 17, ante.)
3. It should be preceded by notice and hearing.
4. It should be filed before service.
5. It was exhausted, dead, when filed (W. p. 16; 98 Cal., 205)
6. Process on the order should have been written by the clerk (B, p. 8, ante) and served by the sheriff (K, p. 8, ante.)
7. It was not served after filing (K, p. 8, ante.)
8. It was not served by any competent person (J, p. 5, ante.)
9. The order was void and could be attacked in any proceeding (G, p. 9, ante.)

Clarke being brought to the bar for contempt filed a respectful answer, which was verified. See Trans. 786 p. 6 to 12

He demanded a jury trial and due process of law. The District Attorney did not appear, but Mr. Warren Olney, private counsel for the prosecutors, did appear and managed the prosecution.

This was not due process of law.

Beimel *vs.* State, 71 Wis., 444;
People *vs.* Bussey, 80 Mich., 501;
46 N. W., 97;
State *vs.* Severine, 49 N. W., 1,056.
Wilson vs. United States, 149 U. S. 61; 70.

We have shown on pages 26-46 of this brief that contempt of court is a crime. Trans. 786 p. 6 to 12 shows a verified answer made by Clarke to the charge of contempt, made by Olney.

It seems incongruous that a judge who makes an order should press himself to sit in judgment on the person charged with crime for disobedience of said order. The mention of a trial suggests the possibility of a defense. A defense suggests an issue of law, or fact, viz., two issues. Every trial should be had before a competent (*i. e.*, an unbiased) tribunal. A judge who makes an order is, by the constitution of the human mind, disqualified from judging a person accused of a crime for disobeying such an order, because by the act of making the order he has prejudged the question of the legality of said order.

A denial of the legality of the order is a sufficient, and legal, defense. The accused is as well entitled to have this branch of his defense tried by a competent court, as he is to be tried on any other branch of his defense. This cannot be had where the judge who made the order sits on the trial of the accused.

In trying the accused, he is trying himself, on the charge of having made an illegal order. The axiom is elementary, that no man can be judge in his own cause. The Tr. , p. , shows that Mr. Clarke demanded a trial by jury. The propriety of the demand is clear. The denial is clearly error.

106 U. S., 408.

Plaintiff in error relies on the principles of law contained in the cases hereinbefore cited, and especially on Ieck *vs.* Anderson, 57 Cal., 251-4.

Re Swan, 150 U. S
Wilson vs. U. S
Re Bonner, 151

Scott *vs.* McNeal, 14 S. C. R., 1112;
Chauvin *vs.* Valeton, 8 Mont., 451;
Howell *vs.* Campbell, 37 Pac. Rep., 120.

" Distinction between errors and absence of jurisdiction."

Knight *vs.* U. S. L. A., 142 U. S., 212.

CONTEMPT.

" That a proceeding to punish for contempt is in its nature a " criminal proceeding has been directly decided by this Court " (State *vs.* Dent, 29 Kan., 416) as well as by Courts of other " States. (Cartwright's case, 114 Mass., 230; Puterbaugh *vs.* " Smith, (111 Sup.), 23 N. E., 428.) The right to appeal from an " order punishing for a contempt has been frequently recognized " by this Court. Peyton's Appeal, 12 Kan., 398; In *Re* Dalton, " 46 Kan., 253; 26 Pac. Rep., 673; State *vs.* Henthorn, 46 Kan., " 613; 26 Pac. Rep., 937; State *vs.* Vincent, 46 Kan., 618; 26 Pac. " Rep., 939; In *Re* Nickell, 47 Kan., 734; 28 Pac. Rep., 1076; In " *Re* Noonan, 47 Kan., 771; 28 Pac. Rep., 1104; In *Re* Harmer, 47 " Kan., 262; 27 Pac. Rep., 1004; State *vs.* Durein, 46 Kan., 695; " 27 Pac. Rep., 148." * * * * *

" A contempt of Court is a substantive criminal offense, and to " adjudicate a case of contempt, and to impose punishment for " such offense, is generally said to be the highest exercise of judi- " cial power."

In *Re* Sims, 37 Pac. Rep., 135–137. 34 NE 1004

(See extract from *Re* Gould, 99 Cal. 360, commencing at *Beta*, on p. 26 of this Brief.)

A conviction for contempt is a criminal action. (Pp. 26–27; 43 *ante.*)

Must be prosecuted in the name of the People. (E. on p. 8, *ante*, Y. on p. 36, *ante.*)

Penal Code, 684.

And by authority of the People.

Penal Code, 684;
53 Cal., 644;
Sec. 20, Article VI, of Constitution of California.

DELTA.

" This is a penal action, and the statutes authorizing it must be " pursued strictly. * * The case never had any lawful existence, " and of course could not result in a lawful judgment."

Swan *vs.* Beach, 29 Barb., 239;
People *vs.* Belknap, 12 N. Y., Sup. 145.

We apply the above decision to this case. The Tr. , p. , shows that this action was not prosecuted in the name or by the authority of the People, and for that reason it was not due process of law. On the contrary, the panoply and power of the State were used by private persons without the consent or authority of the State, for the purpose of wreaking private vengeance in derrogation of public justice.

"*Held*, prosecutor who was engaged in a civil suit against "defendant, wherein charges of forgery were made against him, "was disqualified to prosecute him for the offense of unlawfully "carrying away an enrolled decree, and other papers filed in such "case, when the theory of the prosecution was that he had taken "the documents to destroy the evidence of the forgery; even though "defendant declined to object to the prosecutor's appearance "against him with the purpose of grounding an appeal thereon in "case of a conviction.

"But human nature is so constituted that, in the excitement of a "heated trial, one whose mind is deeply biased and prejudiced "must, perforce, as happened in this case, at times let his rancor "get the better of his judgment, to the detriment of that even-"handed justice which is not only always, in fact, impartial, but "ever has, also, such an appearance as to give all people confidence "in the integrity and equity of the Courts."

People *vs.* Bussey, 80 Mich., 501;
46 N. W., 97;
13 Crim. L. Mag., 39–49. See *Gamma*, p. 27.

DUE PROCESS OF LAW 101 Cal 20-26.

Forbids an inflamed and rancorous attorney who has attempted to prosecute an insolvency proceeding from seizing the sovereignty, to exert in the criminal department of the State the power of punishment, upon his fellow citizen, or adversary in litigation. 71 Wis., 444, and 80 Mich., 501, seem to be sufficient authority on that point. When the attorney makes himself the accusing witness, and the Court proceeds to punish for crime, it becomes necessary that the charge be in writing; in the name of the People endorsed or approved by the District Attorney . The Courts should not be made the vehicles of private enmity or spite.

A crime should be prosecuted by the District Attorney with an even eye, and an equal hand, and in the interests of public Justice.

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A crime should be prosecuted by the District Attorney with an even eye, and an equal hand, and in the interests of public Justice.

In the case at bar Mr. Warren Olney, the leading attorney in the case, on Oct. 17th, 1893, makes an affidavit of six pages of typescript, charging Clarke with crimes. This affidavit was intended, and calculated, to inflame, and evidently did inflame the anger of Judge Jas. E Murphy, to whom it was presented on Oct. 18th, 1893.

Without calling the District Attorney, and without hearing or notice, Judge Murphy makes an arbitrary order—not in Court, but in pais, not sealed, not running in the name of the People, not served by the sheriff—commanding Clarke to appear for trial on next day.

Clarke filed a respectful and verified answer, Tr. 786, pp. 6 to 11, and on the hearing asked for a trial by jury. Tr. 786, p. 15; Jury denied and Clarke committed to jail.

" The information should have been signed by the State Attorney,
" or the Attorney General. The information was not such as would
" legally hold. * His trial and conviction were illegal."

State *vs.* Severine, 49 N. W., 1056;
14 Crim. L. Mag., 209.

The employment of paid special counsel to secure the conviction of an accused person has received judicial reprehension in the Supreme Court of Wisconsin, March 27th, 1888, in Beimel *vs.* State, 39 N. W. R., 244; 71 Wis., 444,

We find the following words of wisdom:

" The question of determination is whether it is in accord with
" the statutes and laws of the State, and with public policy that
" the Court should permit an attorney employed by and expecting
" compensation from private parties to appear and aid in the prose-
" cution of a person charged with a crime punishable by imprison-
" ment in the State Prison. We think it is quite clear from the
" reading of our statutes on the subject, as well as upon public
" policy, that an attorney employed and paid by private parties
" should not be permitted either by the Courts or by the prosecut-
" ing attorney to assist in the trial of such criminal cases. The
" laws have clearly provided that the District Attorney, who is the
" officer provided by the laws of the State to initiate and carry on
" such trials, shall be unprejudiced and unpaid except by State,
" and that he shall have no private interest in such prosecution.
" He is an officer of the State, provided at the expense of the State
" for the purpose of seeing that the criminal laws of the State are
" honestly and impartially administered, unprejudiced by any

" motives of private gain, and holding a position analogous to that " of the Judge who presides at the trial. Such is the view taken " of the office of Prosecuting Attorney by the Courts of this coun- " try as well as of England, and we think it is the true view of his " position."

Hurd *vs.* People, 25 Mich., 416.

"In this case the Court say: The only legitimate object of the " prosecution is to show the whole transaction as it was, whether " its tendency be to establish guilt or innocence. The prosecuting " officer represents the public interests which can never be pro- " moted by the conviction of the innocent. His object, like that " of the Court, should be simply justice; and he has no right to " sacrifice this to the pride of professional success."

Maher *vs.* People, 10 Mich., 226;
Chapman's Case, 8 Car. & P., 559;
Orchard's Case, Id. 565, note.

" These cases clearly indicate the duty of the prosecuting attor- " ney to proceed with all fairness in presenting the cause of the " State to the jury, and in prosecuting the whole case, even though " parts of the case as presented should make in favor of the inno- " cence of the accused. This method of presenting a case is not " that favored or pursued in civil cases, where the paid attorneys " of the respective parties conduct them. And criminal cases are " not likely to be so presented if the prosecution is permitted to " be conducted by the paid attorneys of parties who from passion, " prejudice, or even an honest belief in the guilt of the accused, ' are desirous of procuring his conviction. The statutes of this, " State having carefully provided that as the prosecuting attorney " shall, like the judge on the bench, be free from prejudice of " private interest in conducting the trial of criminal cases, it would " seem to be eminently proper that the Courts, in permitting or " selecting assistants to the public prosecutor under the authority " of the new law upon the subject, viz., chapter 354, laws 1887, " should permit or select only such assistants as are unprejudiced " and impartial as the prosecutor provided by law. This question " has been fully considered by the Courts of Michigan and Massa- " chusetts, States which the laws prescribing the duties of public " prosecutor are substantially like ours, and the Courts of these " States have uniformly held that attorneys employed by private " parties ought not to be permitted to aid the district attorneys in " the conduct of criminal cases."

Meister *vs.* People, 31 Mich., 88;
Sneed *vs.* People, 38 Mich., 248;
People *vs.* Hurst, 41 Mich., 328;
1 N. W. Rep. 1027;
Com. *vs.* Knapp, 10 Pick, 477-482;
Com. *vs.* Williams, 2 Cush., 582-584;
Com. *vs.* King, 8 Gray, 501;
Com. *vs.* Gibbs, 4 Gray, 146.

Mr. Wm. S. Barnes has six assistants in his office of District Attorney, whose pay runs from $1,800 to $3,000 a year, besides a detective policeman.

For the Police Courts we have four prosecuting attorneys at $250, and four clerks at $125, total $1,500 a month, or $50 a day, and our District Attorney Barnes rightly says:

"It is as much his duty to protect the innocent as to punish the "guilty." (W. S. B., District Attorney.)

"The District Attorney acts by the authority of the People. "Const. § 20., Art. VI., Co. Gov. Act., 136.

29 Cal., 210.

"If he fails, the Court is authorized to designate some competent "attorney to take his place for the occasion.

"If deemed essential, it is made the duty of the Attorney-Gen- "eral to go to his aid." (Pol. Code, 470, Sub. 7.)

Modoc *vs.* Spencer, Aug. 6, 1894, 8 Cal. Dec., 52.

The cases at bar exhibit this rancor in a marked degree. Not only is it shown by counsel, but by the presiding judge.

The writer does not contend that no court can remove an obstruction in the nature of a contempt. Such power existed at common law. But, when our codes were passed, many common law rules were amalgamated in the codes. Contempt is a crime.

Sec. 166 Penal Code; 99 Cal., 360, pp. 26, 27. 46, *ante*.

The jurisdiction to punish this crime was in the Police Court, as we have shown on page 27, *ante*.

Reasonable discretion must be used within legal limits; but arbitrary power is excluded.

118 U. S., 356.

"The case had no legal existence." See p. 46, *supra*. This ruling carries away all the proceedings of which we complain.

The insolvency proceeding is a civil action (see p. 22 *ante*) and must be prosecuted in the name of the real party in interest (See p. 26, *ante*.) It is not so prosecuted. This is fatal (p. 45, *ante*).

The contempt of Oct. 19th, 1893, is a criminal action, not prosecuted in the name of the People. (See pp. 26-7, 43, *ante.*) This is fatal.

"No one has a right to surrender his liberty. * The State has "an interest in preserving the liberty of her people, and will not "allow them to be taken without due process of law."

Cancemi *vs.* People, 18 N. Y., 136.

"A criminal trial ought not to be converted into a mere arbitra- "tion, * a jury is twelve men."

Ter. *vs.* Ah Wah, 4 Mont , 149.

"The accused, through persuasion, may be deprived of his "liberty in a manner unknown to the law. His right to be tried "by a jury is a positive requirement of the law."

State *vs* Mansfield, 41 Mo., 475;
106 U. S., 408.

"The constitutional safeguards might be frittered away."

Hill *vs.* People, 16 Mich., 357.

"The good of the profession, as well as the safety of clients, de- "mands the enforcement of the rules."

State *vs.* Halstead, 35 N. W., 457.

In Iowa certain persons were convicted of contempt and fined $500 each. The execution was suspended by order of the Judge.

Held, error. State *vs.* Voss, 45 N. W., 898. The error lay in exalting the will of the Judge above the laws of the land. The same error is found in our case.

"Persuasion" of the Court is denounced in 41 Mo., 475, *supra*. This unlawful persuasion had full operation in our case. By force of imprisonment, by denial of jury, by denial of access to the Courts, by persistent denial of legal remedy in the Courts, by denial of bail, by threat of life imprisonment, the writer was persuaded to surrender his schedule. This promise was extorted from his reluctant lips on Nov. 9th, 1893, by Judge Murphy of Del Norte, on a threat of life imprisonment. The writer did not fail or falter in his devotion to the United States Constitution. He exhausted all the judicial remedies within his reach, and now brings the whole case here for review.

This persuasion was addressed to us in Court by Judges Seawell, Sanderson and Daingerfield.

FEDERAL POWER SUPREME.

Beyond doubt the final decision of any case springing from the XIVth Article comes from this Court. The State Courts may hear such questions, subject to the review of this Court (146 U. S., 183).

Plaintiff in error claimed his liberty under the XIVth Article. Judge Murphy and Warren Olney denied that right.

Plaintiff in error invoked the jurisdiction of the Federal Courts on Oct. 20th, 1893.

It was then the duty of the State tribunals to apply the brake and stay the action of the State Court.

This must be so, unless the State judiciary is superior to the Federal. It is so, because the Act of Congress (§ 766, R. S.) makes it so.

39 Fed., 833;
80 Cal., 280;
84 Cal., 430.

This matter was brought to the notice of the State Court in five petitions for habeas corpus, which are now here for inspection.

The same question was presented to the Supreme Court of this State, Oct. 24th, Nov. 14th, Dec. 14th, and remedy and relief denied; Oct. 24th, Nov. 23rd and Dec. 23rd, 1893. We apprehend that this Court will take judicial notice of the ruling of our State Supreme Court on these petitions for habeas corpus, prohibition, and review. See p. 37, *ante*.

ILLUSTRATION OF FEDERAL SUPREMACY.

The celebrated Sharon case (24 Fed., 729; 7 W. C. R., 229; 84 Cal., 430;) was litigated in the State and Federal Courts.

The Courts reached opposite conclusions. The outcome demonstrated the rule that the Federal Courts were superior to the State Courts. Please read 84 Cal., 430-1, and cases therein cited. The same result is reached in Knight, 142 U. S., 163-214, and in Nagle's case, 135 U. S., p. 1; also 113 U. S., 703; also 118 U. S., 356.

ARBITRARY POWER.

There was no reason or excuse for the exercise of so much "personal and arbitrary power" by Olney and Judge Murphy. "The finding in contempt cases is not conclusive."

99 Cal., 527.

Clarke had appealed from the order of Judge Murphy. Tr. 786, p. 5. If that appeal was void, because not appealable, the proper manner to show that would have been a motion to dismiss the appeal in the State Supreme Court. The verified answer of Mr. Clarke, Tr. 786, pp. 6 to 12, excludes wilful disobedience, and negatives the existence of a guilty mind. The case was one particularly

suited for a trial by jury. The trial by the Judge who had made the order without notice to, or hearing of, the adverse party was bizarre and grotesque to the last degree.

JURISDICTION OF THE PERSON.

"Proof lacking, the Court "has no jurisdiction." See p. 9, *ante*.	"Gets complete jurisdiction "by service of the order." See p. 41, *ante*. (Error say we.)

The above cannot be reconciled.

The authorities on p. 9 demonstrate the error contained in 35 Pac. Rep , 551, and yet the latter case is quite recent.

It is most mischievous, because it tends to mislead both bench and bar on this most important question.

The plaintiff in error has already demonstrated in *re* Clarke, 37 Pac., 102 Cal.—that the lower Court misconstrued the law in the important matter of self crimination. Plaintiff in error had made himself familiar with the Lees case, 150 U. S., 476, and the Wilson case 149 U. S., 61--70; and by these cases he knew the ruling of this Court on that question. Plaintiff in error is equally confident that under the cases cited on p. 46, *ante*, the absence of summons in this case, is fatal error.

COAST LIGHTS.

San Francisco has given lights to many sea going vessels. She has contributed her share of judicial knowledge to the universities of law.

Some of the most important and recent cases have been digested by her students, or pronounced by her judges.

One of the Best.	*One of the Worst.*
"The broad shield of our "blessed Constitution."	"You may remain in jail till "the end of your days."
Ah Kow *vs.* Nunan, San Francisco, July 7, 1879. 5 Saw., 552.	Olney *vs.* Clarke, San Francisco, Oct. 26th, 1893. Daily papers.

In the Sharon case, 24 Fed., 729; the Barbier, 113 U. S., 27; Soon Hing, 113 U. S., 703; Yick Wo, 118 U. S., 356; Nagle, 135 U. S., 1; Knight, 142 U. S., 163--214, and many other leading cases the supremacy of the Federal judiciary has been demonstrated, the vigor of the XIVth Article made very clear. Error, wrong, and oppression may endure for a night, but light, joy and deliverance will come with the morning. Behind the bars on that jail on Broadway, the writer saw the mighty constellation of Orion tread

his pace of glory above our sleeping city, and in the red of Betelguese, and the pale blue of Rigel he read the promise that at the bidding of this august tribunal those prison doors would open and restore the captive to liberty and light.

THE LAW.

Progress.

" The broad shield."
S. F., July 7th, 1879.
" Victorious progress."
118 U. S., 356, May 1886.
" Weight of the Judge's " finger."
151 U. S., 242.
Paul appeals to Cesar A. D., 62, appeal allowed.
Agrippa, C. J.
We concur.
Festus, J.
Bernice, J.
" Civis Romanus Sum."

Regress.

" Life imprisonment."
S. F., Oct. 26th, 1893.
Murphy, J.
All concur.
Nem. Con.
Clarke appeals to Uncle Sam, A. D., 1893.
" Disallowed."
Murphy, J.
All concur.
Nem. Con.
Civis not at home; life imprisonment.
Exit Omnes.

" The progress of the race " between Murphy of Del Norte, and Berkley of Virginia, shows no advancement in 233 years. Between Murphy and Agrippa there is retrogression. The movement of Murphy is backward, and not forward. It is retreat, and not progress. It is to barbarism, and not to freedom. It is to tyranny, and not to liberty.

Civis Romanus, Esto Perpetua.

" It is lawful to scourge a " Roman citizen, who is uncon- " demned?"
Acts, 22 c, 25 v, A. D. 0,062, in Judea.

Civis Americanus.

Disappointment!
" Life imprisonment. No ap- " peal. No bail." no
Murphy of Del Norte, 1893, in San Francisco, Cal.

Manifestly if Judge James E. Murphy of Del Norte is right, 5 Saw., 552; 118 U. S., 356; 151 U. S., 242; are ill decided. Conversely, if these three cases are well decided (of which there is no doubt), then what is to be said of James E. Murphy?

If an impious hand is laid upon the ark, if sacrilege is committed *in the temple* by a priest, what shall be his condemnation?

THE PATH OF SORROWS.

Cowper says:

" The path of sorrows, and that path alone
" Leads to the land where sorrows are unknown."

The writer gave Judge Murphy no cause to censure, imprison and publicly castigate him, as Mr. Murphy has done. The Superior Court of San Francisco has no need of this stranger from the Oregon line to protect it from a member of its own bar.

HUMAN SUFFERING

May be the seed—the only seed—which can produce the fruit of human safety and security. If this be the law, the writer hopes the sowing of his suffering may not fail to produce to others the fruit of safety, against such pernicious and flagitious usurpations of personal and arbitrary power by men ignorant of the genius and inspiration of the true spirit of our laws.

The teachings of the Fathers which we have quoted on pp. 38 to 40, *ante*, seem to indicate that we must be willing to take the sacrament of suffering if we would be true disciples in the school of Liberty.

Arbitrary power is found, where the rule is executed by the same mind which created the rule.

One of the safeguards of Liberty is contained in the division of the Legislative, Judicial and Executive powers.

These questions are ably digested in State *vs.* Noble, 21 N. E., 249; 118 Ind., 350.

Clarke violated no statute.

A strange judge came to a city where he was a stranger.

Without notice to, or hearing of, the person most interested, he made an order. Clarke made an answer under oath (Tr. 786, pp. 6 to 12), and on the hearing the Judge denies a jury, and, by exerting the power of imprisonment the Judge compels Mr. Clarke to obey the orders, the validity and legality of which were firmly denied by Mr. Clarke.

This is not the Government of the Constitution. It is personal and arbitrary power, condemned by 118 U. S., 356, et seq., and *Re* Wilson, 149 U. S., 61--70.

"An assurance to all, that if any man invade any of those rights "(life, liberty, etc.,) whether belonging to the humblest, or the "highest, 60,000,000 of the grandest people this world has ever "seen will spring to their defense."

Creed Haymond, Chicago, 1888.

There is found on p. 352, of vol. 84, of California reports, "the "writ issued in the name of the People, and under seal of the "Court."

True, the defendant in that case was an ex-chief Justice of the California Supreme Court. But we ask is he to be served with more solemnity than this plaintiff in error?

Shall he be accorded full ceremony, while his fellow citizen receives no legal process?

Has the law favors for Wallace, and frowns for Clarke?

"W. T. Wallace fined $10 for "contempt." 87 Cal., 275.	"Clarke life imprisonment."

What explanation can be found, why the writ to an ex-Chief Justice should issue (as all writs should, in the name of the People) and the papers in this case (Mott *vs.* Clarke) without the name of the People and without seal. We pleaded this error (Tr. 786, p. 8), but our plea availed us not.

This incident in the practice of our State Supreme Court is full of instruction for our case. A petition was presented to the Supreme Court, an order for a writ was made and filed with the clerk. The clerk issued the writ, with seal and in the name of the People.

These forms were correct, but they were not observed in our case. by the Superior Court

We ask why they were observed in respect to Judge W. T. Wallace, and disregarded in respect to Alfred Clarke?

There is good reading in 84 Cal., 327-408 and 87 Cal., 267-275.

It proves that there is a wide difference between ~~us~~ Does the law tax the ex-chief Justice ten dollars for his falibility, find the next traveler from the borders of Oregon to be infallible?

The bald absurdity of the suggestion precludes discussion.

We have shown on pp. 12, 13, 14, 15, and *alpha* on p. 21-30 to 33, the regulations made by the general law of the State, regarding the issue and service of process. We have shown the practice of our Supreme Court in 84 Cal., 352, and we have shown that these requirements, these essentials of the law, were omitted and disregarded in our case.

Prohibition is freely used for others, viz: 78 Cal., 556; 84 Cal., 327; (making 81 pages in the report) 87 Cal., 267; 92 Cal., 247; 35 Pac., 551; 35 Pac., 555; 36 Pac., 806; and this same remedy has

te, although we paid $20 clerk's

on of the law" the XIVth Article

Wallace prohibition granted. 81 pages, 84 Cal., 327–408. Fee paid $10.	Clarke denied habeas corpus, Oct. 24, 1893; prohibition, Nov. 23, 1893; review, Dec. 23, 1893. Fees paid $20.
Sentence of Wallace, fine $10.	Life imprisonment. See pp. 41–43, *ante*.

"The case had no legal existence." (*Delta*, p. 46.)

This applies to Trs. 785 and 786. See p. 36, *ante*.

"His trial and conviction were not legal." See p. 48, *ante*.

This applies to Trs. 783 and 784.

49 N. W., 1,056.

The science of the law is an onward march, and the worship calls for sacrifice. When Xerxes invaded Greece he sent heralds to demand submission and surrender. Some cities, (Athens and Sparta) were so foolish as to slaughter the heralds. Atonement became necessary, and men were found willing to present themselves to the conqueror to be killed as an atonement and satisfaction for the slaughter of the heralds.

SPERTHIES and BULIS, citizens of Sparta, of great rank and eminence, offered themselves to die as atonement, and presented themselves at Susa to the all-powerful Xerxes.

Xerxes, more humane than Berkley (p. 43, *ante*,) declined to accept their blood atonement, and sent them back to Sparta.

The example of these Spartans, as well as the inspirations given on pp. 38 to 40, *ante*, give us encouragement to hope that, out of the imprisonment suffered by the plaintiff in error, there shall come a decision by this Court which shall clearly mark the line between the "government of laws," 118 U. S., 356, and "the personal arbitrary power," which is denounced by that great and luminous decision of the late Judge Mathews.

There is another line of reasoning which demonstrates that the proceedings of which we complain are not due process of law. The system of judicial procedure adopted by California and many other (common law) States, contains an appeal to the appellate Courts from all decisions of the primal or subordinate Courts.

We have shown, pp. 26–7, 46, that contempt of Court is a crime, and that the Police Court (27–28) has jurisdiction of that crime. There is an appeal provided by § 1466, of the Penal Code, and this right of appeal being a part of the due process of law provided by the State. The enjoyment of the right to this process is secured by the XIVth Article, United States Constitution.

Therefore it is manifest that, when Judge Murphy took the case from the Police Court and denied Clarke a jury trial, he deprived him of the equal protection of the law by depriving him of an appeal.

There is flagrant error shown in permitting Warren Olney to clothe himself in the lion's skin of authority, and manage the prosecution in derogation of the District Attorney, and in violation of the law. See 136 U. S. Gov't., p. 27, *ante*, pp. 48 to 50 for case law.

Pages 13 and 14 of Trans. 784 show that E. J. McCutchen, a private attorney, appeared adversely to Clarke and Clarke objected. Objection disregarded. We say this was error.

There is no commitment found in the Daingerfield habeas corpus case, Tr. 784. On p. 9 of that Transcript is found the sheriff's return. On p. 15 of said Transcript is a certificate by the clerk "that no part of said return has been omitted or left out."

It would be consonant with the loose and slip-shod practice shown in these proceedings to bring the commitment with the return and read the original or consider it read, and thus save the sheriff the labor of copying the commitment.

We find, on p. 19 of Tr. 886, a certificate of the clerk that no judgment in the contempt case has been entered, and no process issued.

If no process was issued, that would explain why a copy was not found annexed to the sheriff's return (p. 15 of Tr. 786). It was held by our Supreme Court on Aug. 4th, 1894, in *re* Murphy, 21,146, that memorandums of escapes written on the back of a commitment would not be considered by the Court. So in this case we produce the whole return, and we can do no more. In *re* Smith, 33 Pac., 958, quoted at top of p. 3, of our brief, in cases 783-4 is found the procedure for a commitment for contempt, viz: "The "clerk should issue a certified copy of the judgment."

We show by the clerk's certificate in Tr. 786 that no judgment was ever entered, and no process ever issued.

In our State Courts there is much virulent hostility to the XIVth Article. We have met this hostility all through this case.

When a Judge signs a commitment for contempt, he should abstain from influencing the presiding Judge not to allow a writ of error. Judge Murphy thinks otherwise. The writer discovered him coming out of the chamber of Judge Sanderson, on Nov. 7th, 1893. Evidently Judge Murphy had succeeded. Judge Sanderson refused to sign or allow a writ of error, and argued with the writer,

that he ought to obey the reasonable and lawful order of Judge Murphy.

This kind of persuasion is denounced in 41 Mo., 475, quoted on p. 51, *ante*.

Judge Murphy used this *persuasion* by berating us from his bench, and he used his personal influence with the other Judges of the Court, and particularly with A. A. Sanderson, presiding Judge, to defeat our efforts to obtain release on bail; or to procure a writ of error to review the proceedings in this Court. These carmarks evidence personal and arbitrary power.

Ascension.

Xerxes declined human sacrifice 2374 years ago.

"Magna Charta." A. D. 1215.

"Liberty inalienable." 1776.

"XIVth Article." 1868.

"Government of laws." 1886.
118 U. S., 356.

"Judge's finger weight." 1893.
Bonner, 151 U. S., 242.

Jury trial sacred.
U. S. Constitution.
California Constitution.
All the Constitutions.
All the States.

Pan-American Congress.

Arbitration in place of war. 1893.
Blaine.

Declension.

Jury trial abolished by Judge James E. Murphy at San Francisco, 1893.

Lock the Court-room door. San Francisco, 1893.

Writs denied.

"Liberty, trivial and tech-
"nical." 1894.
Re Ahearn, 8 C[illegible]
39. 371

"I need not the [illegible] of a jury."

"My intelligence is sufficient."

"I am wiser than the rest of "mankind."

So thought the Modocs when they killed Gen. Canby and Dr. Thomas.

The declension in the administration of the law is shown with painful clearness in the fact, that the Superior Court was unable to deliver itself from the error which crept into it in the denial of a jury.

In 84 Cal., 352, we find that the dignity and office of the sovereign's writ are confessed and respected.

In *re* Ahearn the indicia of sovereignty are denounced as "trivial "and technical to the last degree."

8 Cal., Dec. 39.

"The name of the People" was used to bring Wallace into Court. Clarke is imprisoned and stripped of his property, without the name of the sovereign in any part of the proceeding. We say this declension is lamentable.

The Fathers say, the books say, that "human liberty is priceless, beyond all price."

To deprive Ahearn of his liberty for six years, or Clarke of his liberty for a month is not a trivial or inconsequential circumstance.

It is the exercise of the power of the sovereign. We have shown on page four of this brief that the Courts of Michigan, Tennessee, and other States regard our claim as very important and essential.

Why it should be held in California to be trivial we are unable to understand.

The Insolvent law, (§ 10) requires the order to be served ten days before the return day.

We have shown (*alpha*, on p. 2, also pp. 8 to 11; p. 33, *supra*,) that the order has no effect until filed. The Tr. 785, p. 21, shows the order was filed Oct. 15th, 1891. There could not be ten days between the 15th of October and Oct. 14th, of the same year. These facts appear in the Transcript, and they demonstrate that due process of law was disregarded.

The DECADENCE OF THE LAW in San Francisco, as illustrated by this case, the Ahearn case, 8 Cal., Dec. 39, (p. 58, *supra*,) and the case which is referred on p. 41, *ante*, (viz., 35 Pac., 551) should excite alarm and regret. It is elementary knowledge that *decision* relates to disputed questions of law, *dictum* to matters not disputed.

How does a Court gain jurisdiction of an insolvent estate?

We reply: by the issue and service of legal process. (1 to 36, *ante*.)

We have already shown in this brief the *indicia* of legal process.

CLASS LEGISLATION

Is unsparingly denounced in 113 U. S., 27, and many other cases, but the XIVth Article has a scope which not only protects classes, but persons. Ah Kow *vs.* Nunan, 5 Saw, 552–562, contains all that need be said on this point. There is a fine lumination in 49 Alb. L. J., 401, (James *vs.* U. S.) which presents the individual right of a person, as contrasted with the aggregate powers of the Government.

Whether by a new Constitution, a statute, a city order, a rule of Court, or an arbitrary, or unauthorized order of a Court or Judge. (151 U. S., 242), the supreme law of the land forbids deprivation of liberty or property without due process of law.

"The evil eye" of jaundiced hatred, "the unequal hand" of covetous spoliation, will find their plans defeated, when inspected by this august tribunal.

Tr. 786, p. 1, contains Judge Murphy's order of Sept. 15th, 1893. The order was made without hearing or notice, apparently *sua sponte*. It was not filed till Oct. 11th, 1893. "It had no effect "until filed."

98 Cal., 205–364.

Being made without hearing or notice it is not due process of law. We quote:

"The fact that the order was made without notice is sufficient "ground for setting aside. * * *

"The circumstance that it was not asked for on behalf of the "party for whose benefit it was made cannot properly be passed "without notice. It is dangerous innovation, subversive of the "conception of the proper limits of judicial authority entertained "by our laws. As the idea of a government of laws emanating "from a legislative representation distinct from the judicial body "has obtained clearness and force, a concurrent tendency has "developed to separate entirely the functions of the Judge and "those of the advocate. Whatever may have been the practice at "times when the liberty of the subject stood on no higher ground "than a concession, either voluntary or extorted, of the dynastic "head of government, at this day the judicial office has been so far "simplified and purified, in theory at least, that the idea of a "Judge initiating any proceeding for the vindication of any right, "either public or private, is anomalous."

The State *vs.* Parker, Richardsons S. Carolina Reports, Vol. 7, page 240. 1876.

Chauvin *vs.* Valeton, 8 Mont., 451, contains valuable citations to the same effect.

RECAPITULATION.

The judgment of May 16th, 1892, (Tr. 785), is fraught with fatal error, because:—

ALPHA.

There is no original writ to give the Court jurisdiction of the person accused. (See Tr. 786, p. 19.) Clerk certifies no summons.

BETA.

The proceedings are not entitled in the names of the adverse parties. See p. 22–36, *ante*. See *Delta* on p. 46.

GAMMA.

The order of Oct. 2nd, 1891, filed Oct. 15th, 1891, not served after filing, * * * the exception to the bond being disregarded.

DELTA.

Due process should have been issued by the clerk and served by the sheriff, as described in 84 Cal., 352, and as prescribed by §§ 4,175–6, and 4,204 of Pol. Code. See pp. 8, 25, *ante*.

EPSILON.

The order of Oct. 2nd was void because not made in Court; not sealed, not running in the name of the People, not stating the jurisdictional facts, and not made on notice and hearing, not served by a competent person (pp. 14--15, *ante*).

ZETA.

Insolvency may be alleged and proved like any other accusation. The insolvent law provides for an action *between parties*. It is not an action *in rem*. Until judgment, a person cannot be known to the Court as an "involuntary insolvent." The use of that stigma in the caption of the order defeats the validity of the order. There was no such proceeding in the Court or known to the Court. The action was Mott *et als. vs.* Clarke, (p. 36 *ante*).

ETA.

The same error of title runs through all the proceedings, and defeats them all. (p. 22–25–36, *ante*, *Delta* on p. 46.)

THETA.

The order signed Sept. 15th, 1893, filed Oct. 11th, 1893, (Tr. 786,) is void for the reasons above stated.

IOTA.

The judgment of contempt given Oct. 19th, 1893, is void.

KAPPA.

To punish contempt as a crime, is a criminal action.

99 Cal., 360; pp. 26–7 *ante.*

Re Sims, 139 Pac., 120; p. 46 *ante.*

LAMBDA.

The proceedings should be in the name of the People, and controlled by the District Attorney. (p. 48, *ante.*)

Modoc *vs.* Spencer, by Supreme Court of California.

Cal. Dec., vol. 8, p. 52; p. 50, *ante;*

99 Cal., 360; 49 N. W., 1,056;

12 N. Y., Sup. 145, p. 26, *ante,* also p. 46, *ante.*

MU.

The paraphernalia, and power of the State cannot be farmed out to private prosecutors, for selfish ends.

71 Wis. 444; pp. 48 to 50, *ante;*

80 Mich., 501, p. 56, *ante;*

49 N. W., 1,056, p. 48, *ante.*

NU.

The denial of a trial by jury was error.

106 U. S., 408.

PSI.

The respondent below, the plaintiff in error here, being in custody under the order made Oct. 19th, sought relief on habeas corpus. He applied to Judge Morrow of the United States District Court, and Judge Gilbert of the United States Circuit Court on Oct. 20th and 21st, 1893.

OMIKRON.

Tr. 783, Clarke *vs.* McDade, shows that these applications to United States Judges were pleaded by Clarke in the Superior Court as a ground for a stay of proceedings, and a release on bail, *pendente lite.*

PI.

This ground was well taken, and a refusal to recognize it was error. The return made by the sheriff (Tr. 783) is insufficient to justify the order remanding the petitioner.

RO.

Tr. 784, brings up the Seawell, Daingerfield and Troutt habeas corpus remands.

SIGMA,

The remand made by Judge Seawell, Oct. 21st, 1893, cannot be

supported, because there was no return made by the sheriff on which the prisoner could be remanded.

TAU.

The remand of Oct. 23rd, 1893, by Judge Daingerfield is violative of § 766, R. S. U. S., and cannot be supported.

UPSILON.

The remand of Nov. 8th, 1893, by Judge Troutt, was equally violative of said § 766, and must be reversed.

PHI.

Tr. 795 brings us up the denial of the writ of habeas corpus, by Judges Hebbard, Wallace and Coffey. The petitions were in substance and effect the same as the petitions which were granted (so far as issuing the writ) by Judges Sanderson (Tr. 783) and Seawell, Daingerfield and Troutt in Tr. 784.

KI.

It is clear that if the last-named four Judges were right in granting the writ, the first named three judges erred in denying it. This preponderance is sufficient to show that Judges Hebbard, Wallace, and Coffey erred in denying the writ.

PSI.

The Bowman and Chute cases printed in brief No. 784, are correct expositions of the law, and should be adhered to, as against any argument based on comity of judges or questions of delicacy described in the Bowman case.

OMEGA.

We respectfully ask that each judgment of denial of the writ be reversed, each remand be reversed, and the Court below be directed to discharge the prisoner. Also that the judgment of May 16th, 1892, (Tr. 785), and the judgment of Oct. 19th, 1893, (Tr. 786), be reversed, and for costs.

CLARA SHORTRIDGE FOLTZ,
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ALFRED CLARKE,
Joining on this Brief.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

156-165

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

CLARKE,	APPELLANT,	*vs.*	McDADE,	RESPONDENT,	No. 158
CLARKE,	"	"	McDADE,	"	" 159
CLARKE,	"	"	MOTT,	"	" 160
CLARKE,	"	"	MOTT,	"	" 161
CLARKE,	"	"	MOTT, Dade	"	" 165

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

CLARA S. FOLTZ,
Attorney for Plaintiff.

CLARKE'S COLLEGE OF THE LAW,
305 *Larkin street.*

San Francisco, September 30 1896.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

CLARKE,	APPELLANT,	*vs.*	McDADE,	RESPONDENT,	No.	158
CLARKE,	"	"	McDADE,	"	"	159
CLARKE,	"	"	MOTT,	"	"	160
CLARKE,	"	"	MOTT,	"	"	161
CLARKE,	"	"	McDADE,	"	"	165

Supplemental Brief for Plaintiff in Error.

CLARKE'S COLLEGE OF THE LAW,
305 Larkin Street.

SAN FRANCISCO, September 30, 1896.

These five cases all spring from a cause commenced October 2d, 1891. See Tr. 160, which was an insolvency proceeding. No final judgment was ever given, no judgment fee paid, no judgment made up. There was simply a minute order made May 12th, 1894, "Respondent adjudged insolvent." There was no process or judicial writ ever issued, and no ~~manner~~ of process. waiver

Appellant insists:

1. There must be judicial process.
2. Legal *service of process.*

Our Codes, providing for writs, running in the name of the people, authenticated by seal, are not satisfied by a chamber order, *not filed, not sealed,* not running *in the name of the people.* The life of the order is terminated by flux of time if it be not filed before the return day. In our case the order to perform on October 14th was not filed until October 15th, 1891. It was then defunct.

"A citation not served is no citation."

Lloyd *vs.* Alexander, 1 Cr. 365, by Marshall, C. J.
U. S. *vs.* Curry, 6 How. 112, by Taney, C. J.

Castro *vs.* U. S , 3 Wall, 46-50, by Chase, C. J.

Section 10 of Insolvent Law required 10 days notice before hearing. The order filed October 15th, 1891, could not be served ten days before October 14th, of the same year.

We respectfully ask the Court to examine the authorities cited in the original briefs, of 63 pages in Mott case and 8 pages in McDade case.

Since the filing of the original brief, Oct. 11th, 1894, a case has passed this Court (Dick *vs.* Foraker, 155 U. S. 404,) which seems to be decisive of this case:

"No process was issued * * * The Court's decree was "binding upon no one."

Our case is precisely the same.

Due process of law requires the issue and service of a judicial writ.

Montanya *vs.* Montanya, 43 Pac. Rep. 345.
Goldey *vs.* Morning, N. 156 U. S. 518.

True, it may be waived by a voluntary appearance by defendant; but in this case there was no waiver.

Without a writ there is no suit.

"The writ, like the Roman formula, alone gave jurisdiction to the "justices, and equally defined its limits."

Fleta, 11 C. 34, de Just. de Banco.

"No action in the King's courts could be commenced without "a writ."

Spence on Jurisdiction of Courts of Chancery, Vol. I, p. 215. Blackstone, III, p. 375.

Under the XIV Article the Federal power is pledged to the enforcement of this due process of law.

Hodges *vs.* Easton, 106 U. S., 408.

If the Court had not acquired jurisdiction of the insolvency proceeding, it needs no argument to show that the Court had no jurisdiction to convict of the contempt contained in Clarke *vs.* McDade. (No. 158, 159, 165, Docket of 1896.)

The commitment made by Judge J. E. Murphy, on October 19th, 1891, is not in the record. That is no fault of the appellant. The Clerk certifies (see p. 15, MS. of Tr. 159,) "that no part of the return has been omitted."

The explanation of the absence of this paper is the following:

The paper signed by Judge Murphy was produced before Judge Daingerfield on October 23d, 1891. Clarke pointed out so many defects in it, that its sponsors got ashamed of it, and suppressed or destroyed it, so that it might not be used against them in subsequent proceedings.

If they had pursued the law, as laid *in re* Smith, 52 Kan. 13, and obtained a minute order; finding Clarke guilty of contempt, the Clerk could afterwards make out a legal commitment, a certified copy of which should be given to the Sheriff. Had this been done, there would be no danger of loss of the commitment, and a certified copy could always be procured.

" The Court had no jurisdiction, and rightly dismissed the case. " although no question had been raised either by demurrer or " plea."

Ellenwood *vs.* Marietta, 158 U. S., 108.

The old Insolvency law of 1880 has been repealed (see Stat. 1895, p. 92.) Section 10 of the new law gives power to the Court, *or Judge*. The old law gave the power to the Court only.

Respectfully submitted,

ALFRED CLARKE, *Plaintiff*.

A. C. SEARLE, *of Counsel*.